Supreme Court, U.S.
FILED

(1) No. 961131 JAN 15 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

DEBORAH I. VOLBERG,

Petitioner,

v.

GEORGE E. PATAKI, Individually and as the Governor of the State of New York, CONSTANCE KELLOGG-BARRELLA, Individually and as Deputy Commissioner of the NYS Dept. of Environmental Conservation, FRANK BIFERA, Individually and as General Counsel to the Dept. of Environmental Conservation, MICHAEL FINNEGAN, Individually and in his capacity as counsel to the Governor, and GAVIN DONAHUE, Individually and in his capacity as Special Assistant,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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96 pp

QUESTIONS PRESENTED

1.

Whether a staff attorney's comments on a state government staff reduction plan, which she believed would have a disparate impact on minorities in violation of Title VII, 42 U.S.C. §2000e-2, comprised an expression of opinion on a matter of public concern protected by the First Amendment?

2.

Whether Petitioner was entitled to First Amendment free speech protection despite the contention that she was a "policy-maker"?

3.

Whether the Court of Appeals erred when it concluded that Petitioner had failed to meet the threshold requirement for a retaliatory discharge claim under Title VII, 42 U.S.C. §2000e-3(a) because, as an attorney, she could not have had a good faith, reasonable belief that Respondents plan would have a disparate impact on minority employees?

4.

Whether the Court of Appeals erred when it extended to Respondents qualified immunity premised upon the so-called policy-maker exception to First Amendment protection?

PARTIES

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In The

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October Term, 1996

DEBORAH I. VOLBERG,

Petitioner,

v.

GEORGE E. PATAKI, Individually and as the Governor of the State of New York, CONSTANCE KELLOGG-BARRELLA, Individually and as Deputy Commissioner of the NYS Dept. of Environmental Conservation, FRANK BIFERA, Individually and as General Counsel to the Dept. of Environmental Conservation, MICHAEL FINNEGAN, Individually and in his capacity as counsel to the Governor, and GAVIN DONAHUE, Individually and in his capacity as Special Assistant,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals, which was not officially reported, is annexed hereto as Appendix A. The opinion of the United States District Court for the Northern District of New York is officially reported as

Volberg v. Pataki, 917 F.Supp. 909 (1996) and is annexed hereto as Appendix B.

JURISDICTIONAL STATEMENT

Petitioner Deborah I. Volberg is a domiciliary of the State of New York and resident of the City of White Plains, New York. She commenced this action against George E. Pataki, Governor of New York, Constance Kellogg-Barrella, Deputy Commissioner of the New York State Department of Environmental Conservation, Frank Bifera, General Counsel to the Department of Environmental Conservation, Michael Finnegan, counsel to the Governor, and Gavin Donahue, Special Assistant to the Governor, pursuant to Title VII, 42 U.S.C. 2000-e *et seq*. and 42 U.S.C. §1983 to redress acts of retaliation in violation of the Constitutions and Laws of both the United States and the State of New York.

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§1331 and 1343(a)(3).[1] Petitioner's related state law claims were interposed in accordance with the Court's supplemental jurisdiction, 28 U.S.C. §1367.

By Judgment dated March 1, 1996, the United States District Court for the Northern District of New York (McAvoy, C.J.) dismissed Petitioner's complaint upon

---

[1] Plaintiff timely filed a charge of discrimination (#160-95-1107) with the Equal Employment Opportunity Commission on February 28, 1995, in which charge she alleged that her firing was retaliatory and violative of 42 U.S.C. § 2000e-3(a). By letter dated August 25, 1995, the United States Department of Justice, Civil Rights Division, issued a so-called Right to Sue letter.

Respondents' motion to dismiss on the pleadings (Appendix B). The Judgment finally disposed of Petitioner's action. A Notice of Appeal was filed on March 13, 1996 (Appendix G).

The jurisdiction of the United States Court of Appeals for the Second Circuit was invoked pursuant to 28 U.S.C. §1291. By Judgment dated October 17, 1996, the Court of Appeals affirmed the District Court's dismissal of the complaint (Appendix A).

In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of entry of judgment of the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

A. Constitutional Provisions

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the rights of the people to peaceably assemble, and to petition the Government for a redress of grievances.

B. Statutory Provisions

Chapter 42, Section 2000e-2(a) of the United States Code (1994), provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Chapter 42, Section 2000e-3(a) of the United States Code (1994), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees. . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. The Facts Alleged in the First Amended Complaint

Until February 22, 1995, Petitioner Deborah I. Volberg (hereinafter "Petitioner" or "Volberg") was a long-term, career attorney who had been employed by the State of New York, first in the office of the Attorney General, and thereafter in the Department of Environmental Conservation (hereinafter "Department" or "agency") (Appendix C at A31-32). She has, in all employment capacities with the State, performed in a superior manner and has consistently received excellent job

performance evaluations, promotions, and salary increments commensurate with her skills and the quality of her job performance (Appendix C at A32).

On or about November 5, 1994, Respondent George E. Pataki (hereinafter "Pataki"), with the active assistance of his co-Respondents, won election as Governor of the State of New York (ibid.). As a proximate result of Pataki's election victory, Respondents entered into a scheme, conspiracy and/or plan (hereafter "plan") to terminate the State employment of hundreds of persons known to have supported former Governor Mario Cuomo (hereinafter "Cuomo") and/or known to have associated with and/or advocated the election of Democratic candidates in order to replace them with relatives and/or friends and/or campaign hangers-on (ibid.). In furtherance of Respondents' plan and commencing in early January of 1995, lists of *inter alia* targeted minority employees were drawn up and orders were issued by Respondents requiring the termination of their employment (ibid.).

When the attorney who supervised Volberg was removed from his job position, she was directed by the new administration to temporarily assume his supervisory responsibilities which included the giving of notice to co-workers that they were being fired for partisan political reasons (id. at A32-33). Out of a deep personal conviction that most of the politically motivated firings were improper, would grossly impair the administration of the Office of General Counsel (hereinafter "OGC") to the Department, and would within the Department result in a grossly disparate impact on the Agency's few minority employees, Volberg on February 22, 1995, wrote to Respondent Constance Kellogg-Barrella

(hereinafter "Barrella"), Respondent Gavin Donohue (hereinafter "Donahue"), and other policy makers in Pataki's administration in order to express her opinion regarding these matters of serious public concern (id. at A33). She wrote, *inter alia*:

> "I submitted to Nancy Lussier, at her request, on February 20, 1995 a copy of the attached memorandum specifying 7 attorney positions to be eliminated. It was my understanding that I could target both regional and central office attorneys, as well as either exempt, non-competitive or competitive. After being directed to select 7 attorney positions, after careful review, I chose positions to target—based on my best professional judgment—whose elimination would have the least impact on the ability of the OGC [Office of General Counsel] to carry out its mandate to provide legal counsel to the Executive Staff, programs and the public.
>
> Today, Judy Hogue advised me, and you confirmed in our conversation this afternoon, that I am directed to target only competitive class positions. Again in my best professional judgment, this would cripple OGC's and the Department's ability to provide adequate services.
>
> Moreover, the end result of that exercise would be the loss of most of our minority attorneys, who are our most recent hires. As I advised you this afternoon, such an action might expose this

agency, and individuals involved in the termination decisions, to liability under the federal Civil Rights Act, Titles VI and VII.

Over the last two years, OGC has made a concerted effort to recruit and hire minority attorneys, as we had previously no minority attorneys in our office. In the last two years, we hired six minority attorneys. As a result of Ann DeBarbieri's termination as a Deputy Commissioner, she is bumping back down into OGC, and bumping out Rosanne Nichols (a minority). If we target competitive class positions within the Central Office, the next two vulnerable attorneys would be Monica Abreu and Shakira Gafar, both minorities. (I understand that Ms. Gafar submitted her resignation today; that renders Scott Crisafulli, not a minority, vulnerable.) If I target competitive class positions in the regions (a separate bumping pool), the most vulnerable attorneys would be Murali Balachandran (a minority) and Jeanna Hussey (a minority). Not including Ms. Gafar who is leaving voluntarily, we will have lost, as a result of the recent layoffs and targeting competitive class positions, three minority attorneys (out of a remaining five).

At your request, I have attached a list of all remaining exempt positions in OGC. I have also attached two proposed lists of cuts: one ("A") which would target only the exempt positions

> while (McCloskey and Ferrentino), and five competitive class attorneys (including Ms. Gafar and Ms. Abreu); and the other ("B") which would target Ms. Kamaras, an exempt position, rather than Ms. Abreu. Ms. Kamaras today advised me that on March 9, 1995, she will be resigning effective March 22, 1995. If we target Ms. Kamaras' position rather than Ms. Abreu's, we would lose 2 rather than 3 minority attorneys."

(id. at A33-35).

After Volberg expressed her opinion in the above referenced memorandum, Respondents agreed to fire her (id. at A35). That agreement was substantially motivated by Respondents' desire to retaliate against Volberg because she had expressed her opposition to Respondents' partisan political job termination scheme due to its disparate impact upon minorities and/or because the protested reduction of Agency staff would severely inhibit its ability to perform effectively (ibid.). As a result, Petitioner's employment was terminated on February 22, 1995, the very same day she sent the aforementioned memo expressing her opinion (ibid.).

At the time Respondents terminated Volberg's employment, they knew that she could not be lawfully punished by reason of her opposition to Respondents' targeting of minority staff for firing, and that her punitive termination would violate Volberg's rights as guaranteed her by reason of the First Amendment and 42 U.S.C. 2000e-3(a) (ibid.). In willful disregard of those rights, Respondents knowingly ended Volberg's employment relationship with the

State with the specific intent to punish her for expressing her opinion on a matter of public concern (id. at A35-36).

B. Prior Proceedings

Petitioner Volberg initiated the instant action alleging that her termination violated the First Amendment, Title VII and corresponding sections of New York's constitution and statutes (Appendix C at A36-69). Before any discovery was conducted, Respondents moved for dismissal on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure with respect to Petitioner's Title VII and First Amendment free speech claims, and summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure with respect to Petitioner's First Amendment freedom of association claim (Appendix D at A41-42).

Before the motion was decided, Petitioner withdrew her freedom of association claim, rendering Respondents' motion for summary judgment moot (Appendix B at A12). Nevertheless, the District Court for the Northern District of New York dismissed Volberg's complaint upon Respondents' motion to dismiss on the pleadings (Appendix B, A8-27). Due to the factual and legal errors in the District Court's Memorandum and Order, Volberg appealed (Appendix G, A74).

The Court of Appeals for the Second Circuit affirmed the dismissal (Appendix A, A1-6). The Circuit Court held that "as an attorney, Volberg could not have had a good faith reasonable belief" that Respondents actions would have violated the rights of employees targeted for termination and, therefore, failed to meet the threshold for a retaliatory

termination claim (id. at A4). Moreover, the Circuit Court held that Volberg's memorandum regarding the subject terminations was not an expression of opinion on a matter of public concern and, therefore not protected by the First Amendment (id. at A4-5). Lastly, the Circuit Court held that the individual Defendants were entitled to qualified immunity because no jury could find that "it was objectively unreasonable for the defendant[s] to believe that firing a policy-making employee on the basis of that employee's" expression of opinion "would not clearly violate statutory or constitutional mandates" (id. at A5-6) (citation omitted).

ARGUMENT

It is axiomatic that in connection with a motion to dismiss, all of the facts set forth in the complaint must be deemed true and all inferences must be drawn in favor of the non-moving party. *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994); *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993). It is equally well-settled that a complaint may only be dismissed when it appears beyond doubt that the Plaintiff cannot prove any set of facts in support of her claims which would entitle her to relief. *Id.* Moreover, as the Second Circuit has held, "[t]his standard is applied with even greater force where the plaintiff alleges civil rights violations". *Id.*

Despite these well established principles, the District Court ignored pivotal facts alleged in the complaint and drew significant inferences adverse to Petitioner, the non-moving party which findings were improvidently adopted by the Circuit Court. Clearly, certiorari is appropriate.

POINT I

VOLBERG'S EXPRESSION OF OPINION REGARDING DISCRIMINATORY EMPLOYMENT PRACTICES AND MALADMINISTRATION WAS ENTITLED TO FIRST AMENDMENT PROTECTION

The District Court held that Petitioner's First Amendment free speech rights were not violated when she was fired for expressing her opinion regarding the apparently discriminatory termination of certain employees in her department (Appendix B at A19-23). The District Court held that the opinion Volberg expressed was not a matter of public concern because she was not entitled to First Amendment protection due to her employment position (id. at A21).

The Second Circuit affirmed (Appendix A at A4-5). Contrary to the allegations of the complaint, the Circuit Court held that Volberg's speech was not on a matter of public concern because she was a policymaking employee and her opinion "was related to the identification and implementation of Departmental policy regarding workforce reductions." (id. at A5).

The dismissal at issue here conflicts with the decisions of this Court governing First Amendment free speech rights of government employees. Moreover, it typifies the confusion of concepts articulated in free speech cases with those articulated in free association/political patronage cases. *Compare O'Hare Truck Service Incorporated v. City of Northlake*, 116 S. Ct. 2353 (1996); *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 116 S. Ct. 2342 (1996); *Waters v. Churchill*, 128 L. Ed. 2d 686 (1994); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Meyers*, 461 U.S. 138 (1983);

Perry v. Sinderman, 408 U.S. 593, 597 (1972); *and, Pickering v. Board of Education*, 391 U.S. 563 (1968), *with Branti v. Finkel*, 445 U.S. 507 (1980); *and, Elrod v. Burns*, 427 U.S. 347 (1976).

In that connection, there is an unresolved conflict between the Circuit Courts of Appeal regarding the application of free association/political patronage principles to First Amendment free speech claims by confidential/policy-making government employees. Specifically, the Second Circuit concurs with the Ninth Circuit's holding in *Fender v. City of Oregon City*, 811 F.Supp. 554, 561 (D. Or. 1993), *aff'd*, 37 F.3d 1505 (1994) that expressions of opinion by employees in policymaking or confidential positions are not protected by the First Amendment.

Inconsistently, the Eleventh Circuit has held that free association/political patronage consideration regarding the government employee's policymaker status should not be considered when evaluating a free speech claim. *Stough v. Gallagher*, 967 F.2d 1523, 1527-28 (11th Cir. 1992). Moreover, the Tenth Circuit has held that a high level employee's comments regarding perceived employment discrimination are matters of public concern entitled to constitutional protection.[2] *Patrick v. Miller*, 953 F.2d 1240, 1247 (1992)(City Financial Director).

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[2] Indeed, even the Second Circuit has previously held that complaints of systemic discrimination are First Amendment protected speech. *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 143 (2d Cir. 1993), *cert. den.*, 114 S.Ct. 1189 (1994).

Finally, the Seventh Circuit has noted the conflict between the Circuits on this issue and held that free association policymaker concepts may apply to free speech claims under certain circumstances. *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1220-21 (1994), *cert.denied*, 115 S.Ct. 1111. *See also*, *Warzon v. Drew*, 60 F.3d 1234 (1995); *Wilbur v. Mahan*, 3 F.3d 214 (1993). In order to resolve these conflicting opinion, a writ of certiorari should be granted.

POINT II

VOLBERG'S GOOD FAITH EXPRESSION OF OPINION REGARDING DISCRIMINATORY EMPLOYMENT PRACTICES WAS IMPROPERLY SUBJECTED TO HEIGHTENED SCRUTINY BECAUSE SHE WAS AN ATTORNEY

Petitioner alleged that she voiced good faith opposition to Respondents' discriminatory employment practices (Appendix C at A36). She further alleged that she was fired in direct retaliation for voicing her opposition to Respondents' directive (id. at A35). Despite these allegations, Volberg's complaint was dismissed on its face.

That resolution of Petitioner's Title VII retaliation claim was expressly based on a finding that she could not have a good faith basis for her alleged belief that Respondents were violating Title VII by effecting terminations with a disparate impact on minorities (Appendix A at A4). This finding was based on adverse inferences drawn against Petitioner and has absolutely no basis in the complaint (ibid; Appendix B at A19).

More problematically, the "good faith" basis of Volberg's belief was expressly subjected to an elevated level of scrutiny because she is an attorney (Appendix A at A4; Appendix B at A15). There is no basis for this heightened "reasonable attorney" scrutiny in Title VII, 42 U.S.C. §2000e-3(a), or case law. Indeed, neither the District Court nor the Circuit Court cited any precedent for its application of the heightened scrutiny test (Appendix A at A4; Appendix B at A15). This substantial departure from established law warrants a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

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United States Court of Appeals

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of October one thousand nine hundred and ninety-six.

/Stamp/Oct 17 1996
United States Court of Appeals
Second Circuit
Clerk

PRESENT:
HONORABLE JON O. NEWMAN,Chief Judge.
HONORABLE RICHARD J. CARDAMONE,
HONORABLE JOSEPH M. McLAUGHLIN,
Circuit Judges.

96-7296

DEBORAH I. VOLBERG,

Plaintiff-Appellant,

v.

GEORGE E. PATAKI, individually and as Governor of the State of New York, CONSTANCE KELLOGG-BARRELLA, individually and as Deputy Commissioner of the New York State Department of Environmental Conservation, FRANK BIFERA, individually and acting as General Counsel to the Department of Environmental Conservation, MICHAEL FINNEGAN, individually and in his capacity as counsel to the Governor, and GAVIN DONOHUE, individually and in his capacity as Special Assistant,

Defendants-Appellees.

APPEARING FOR APPELLANT:
Craig Dickinson, Lovett & Gould, White Plains, N.Y.

APPEARING FOR APPELLEES:
Michael S. Buskus, Asst. Atty. Gen., Office of the N.Y. State Atty. Gen., Albany, N.Y.

Appeal from the United States District Court for the Northern District of New York (Thomas J. McAvoy, Chief Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Deborah I. Volberg appeals from the March 5, 1996, judgment of the District Court dismissing, upon appellees' motion to dismiss on the pleadings, her complaint alleging that she was fired in retaliation for protected civil rights activity, in violation of 42 U.S.C. § 2000e-3(a) and for exercising her free speech rights, in violation of 42 U.S.C. § 1983.

Until her termination on February 22, 1995, Volberg was employed as General Counsel of the New York State Department of Environmental Protection ("DEP"). On that day, Volberg wrote a memorandum addressed to her superiors in the administration of recently elected Governor George Pataki, suggesting a method of downsizing the workforce in the Department without diminishing the Department's ability to provide services. Volberg expressed her opinion that the planned elimination of civil service attorney positions might expose the Department to Title VII liability, and suggested an alternative method for achieving the mandatory downsizing, whereby fewer minority attorneys would be affected. Specifically, Volberg suggested that instead of reducing only civil service positions, which were held by the most junior employees and mostly by minority employees, the staff reductions should also be shared among the "exempt" employees. When Volberg's superiors received the memorandum, they fired her.

Volberg alleged in her complaint that the new administration under Governor Pataki, a Republican, had embarked on a scheme to eliminate employees who had supported the re-election of Democratic Governor Cuomo; that certain employees, including minorities, were targeted for elimination so that Pataki supporters could be hired to replace them; and that she was fired due to her written opposition to

the job termination on the grounds that it would have a disparate impact on minority attorneys.

1. A plaintiff claiming retaliatory dismissal must have a good faith, reasonable belief that the underlying challenged actions of the employer violated Title VII. *Manoharan v. Columbia University College of Physicians and Surgeons*, 842 F.2d 590 (2d Cir. 1988). Thus, Volberg would have to show that she had a good faith reasonable belief that a Title VII action would lie based on the disparate impact on minorities. Absent some other evidence of discrimination, the selection of employees for termination on the basis of a civil service seniority system does not discriminate against minorities even when minorities are disproportionately affected by the terminations. *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976). We agree with the District Court that as an attorney, Volberg could not have had a good faith reasonable belief that the appellees' proposed actions in selecting positions for elimination would have violated the constitutional rights of those employees. We therefore conclude that Volberg failed to meet the threshold requirements for a claim of retaliatory dismissal.

2. A plaintiff pursuing an employment-related free speech claim under 42 U.S.C. § 1983 must initially establish that her speech is protected by the First Amendment. Generally, a state employee may not be fired for speaking on a matter of public concern. *Frank v. Relin*, 1 F.3d 1317 (2d Cir.), *cert. denied*, 510 U.S. 1012 (1993). Whether an employee's speech involves a matter of public concern depends on the "content, form and context of [the] statement, as revealed by the whole record." *Connick v. Myers* 461 U.S. 138, 147-148 (1983).

In this case, Volberg's memorandum conveyed her opinion as DEP General Counsel and as a policy-maker in that Department. The main purpose of the memorandum was to convince the administration to implement workforce reductions in a manner that would, in Volberg's "best professional judgment," be the least detrimental to the continued performance of the Department's functions. Unlike the complaint in this case, the memorandum itself did not implicate system-wide partisan discrimination, nor did it seek to correct any alleged unlawful partisan practices. *See Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 143 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994). Instead, the memorandum was related to the identification and implementation of Departmental policy regarding workforce reductions. The statement of potential exposure of the Agency to Title VII liability did not, in the context of the entire record in this case, transform Volberg's policy-related memorandum into speech on a matter of public concern. As a result, Volberg's speech was not protected by the First Amendment, and the judgment of dismissal was appropriate.

The District Court alternatively found that even if Volberg's speech was protected under the First Amendment, the appellees would be qualifiedly immune from liability since their conduct "did not violate established statutory or constitutional rights of which a reasonable person would have known." *Volberg v. Pataki*, 917 F. Supp. 909, 920 (N.D.N.Y. 1996) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). We agree. Judgment is appropriate, where, as here, no reasonable jury looking at the facts in a light most favorable to the plaintiff could have concluded it was objectively unreasonable for the defendant to believe that firing a policy-making employee on the basis of that employee's

disagreement with the internal policies of the administration would not clearly violate statutory or constitutional mandates. *Relin*, 1 F.3d at 1328 (citations omitted).

/signature
Chief Judge.

/signatures
Circuit Judges.

United States Court of Appeals

FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

NOTICE

Local Rule effective July 1, 1992
0.40 Petitions for Rehearing

Each petition for rehearing shall include a copy of the opinion or summary order to which the petition relates.

If a petition for rehearing be found to be wholly without merit, vexatious and for delay, the court may tax a sum not exceeding $250 against petitioner in favor of his adversary, to be collected with the costs in the case.

July 1, 1992

rehrg_frm

APPENDIX B

United States District Court

NORTHERN DISTRICT OF NEW YORK
95-CV-1095

DEBORAH I. VOLBERG,

Plaintiff,

-against

GEORGE E. PATAKI, individually and as Governor of the State of New York, CONSTANCE KELLOG-BARBELLA, individually and as Deputy Commissioner of the New York State Department of Environmental Conservation, FRANK BIFERA, individually and as Acting General Counsel to the Department of Environmental Conservation, MICHAEL FINNEGAN, individually and in his capacity as Counsel to the Governor, and GAVIN DONOHUE, individually and in his capacity as Special Assistant to the Governor,

Defendants.

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N.D. of N.Y./Filed Feb 28 1986

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Appearances:

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For Defendants;
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Thomas J. McAvoy, Chief U.S.D.C.J.

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

Plaintiff Deborah Volberg commenced this action by filing a complaint on February 27, 1995, in the Southern District of New York. On July 26, 1995, Southern District Judge Barrington Parker granted defendants' motion to transfer venue to this Court. Finally, on August 31, 1995, plaintiff filed an amended complaint wherein she alleges violations of Title VII, 42 U.S.C. § 2000e-3, the First Amendment pursuant to 42 U.S.C. § 1983, the New York State Constitution, and New York statutory law by **defendants George Pataki, Constance Kellog-Barrella, Frank Bifera, Michael Finnegan, and Gavin Donohue.** Plaintiff generally alleges that she was terminated as Acting Deputy Commissioner and General Counsel of the New York State Department of Environmental Conservation ("DEC") for improper retaliatory reasons. Defendants now move for judgment on the pleadings and for summary judgment.

II. BACKGROUND

DEC hired plaintiff in February, 1993, as Deputy Counsel and Director of Legal Affairs. In Early 1995, the DEC Commissioner appointed her as Acting Deputy Commissioner and General Counsel. Both these positions are classified as "exempt" such that employees in the positions do not obtain "tenure" and are not protected from termination by the Civil Service Law. *See* N.Y. Civ. Serv. Law §§ 41, 75. Furthermore, both these positions have been designated as "policy-making" by the Public Officers Law, so plaintiff was required to file annual financial disclosure forms with the New York State Ethics Commission and risked termination if the Governorship were to change hands. N.Y. Pub. Off. Law § 73-a. Finally, both jobs held by plaintiff were relatively high-paying; she began at an annual salary of $72,473 and was making $80,188 after her promotion.

After the inauguration of defendant Pataki as Governor in January, 1995, plaintiff was directed by defendants to identify seven competitive-class[1] attorney positions at DEC to be eliminated. Plaintiff contends that, at least part of the basis for this instruction, defendants entered into a scheme whereby they would fire employees who were registered members of

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[1] The "competitive class" of state workers "shall include all positions for which it is practicable to determine the merit and fitness of applicants by competitive examination . . .." N.Y. Civ. Serv. Law § 44. Employees in "competitive class" positions "shall not be removed or otherwise subjected to any disciplinary penalty . . . except for incompetency or misconduct shown after a hearing . . .." N.Y. Civ. Serv. Law § 75. The positions of such employees may be eliminated, however. *See* N.Y. Civ. Serv. Law § 80.

the Democratic Party or who had otherwise opposed the election of Governor Pataki. Plaintiff also alleges that she opposed the reduction in staff on the grounds that political firings were generally improper, and that the layoffs would weaken DEC's effectiveness and would expose DEC to liability under Titles VI and VII.

In order to communicate her misgivings, plaintiff sent a memo to her supervisors on or about February 22, 1995, in regard to the plan to eliminate the seven competitive attorney positions. DEC recently had hired a group of minority lawyers, and plaintiff expressed her opinion that the effect of targeting competitive positions would be the termination of three of the five remaining minority lawyers. In plaintiff's view, such action would have a disparate impact on those lawyers and could lead to legal action against DEC. Thus she proposed two alternative plans in her memo for carrying out the layoffs that would lead to the loss of only two, rather than three, of the minority lawyers. Finally, plaintiff stated that "in my best professional judgment," such firings "would cripple [DEC's] ability to provide adequate services." (Pl.'s Mem. Opp. Dism. At 6.)

Plaintiff was fired soon after defendants became aware of her memo. Her last day on the job was March 17, 1995. Plaintiff brings four federal causes of action in her Complaint related to her firing: (1) because defendants discharged her in retaliation for her memo concerning, *inter alia*, disparate impact discrimination, they violated her rights under Title VII, 42 U.S.C. § 2000e-3; (2) defendants violated her First Amendment right of free speech; (3) defendants violated her First Amendment right of association by firing her because she is a Democrat; and (4) defendants violated her First

Amendment right to petition for redress of grievances. Plaintiff also seeks relief for the same alleged misconduct in four other causes of action pursuant to analogous provisions of New York law.

Defendants now move for dismissal pursuant to Fed. R. Civ. P. 12(c) on plaintiff's claims related to Title VII, free speech, and the right to petition, and for summary judgment pursuant to Fed. R. Civ. P. 56 on plaintiff's right of association claim. Defendants generally assert that (1) plaintiff's action in writing the memo was not protected activity under Title VII; (2) the memo itself was not protected speech or petitioning under the First Amendment; (3) plaintiff was a "confidential policy-maker" who consequently was not protected against politically motivated discharges; and (4) defendants are qualifiedly immune from liability on plaintiff's First Amendment claims. The following constitutes the Court's adjudication of the issues raised.

III. DISCUSSION

A. DEFENDANTS' SUMMARY JUDGMENT MOTION

In her Memorandum of Law opposing defendants' motions, plaintiff withdraws her Third Cause of Action, under which she claimed that defendants' conduct violated her First Amendment right of association. Plaintiff emphasizes that she is not withdrawing any of her other claims. As a result, plaintiff's Third Cause of Action may be dismissed and defendants' summary judgment motion on that count pursuant to Fed. R. Civ. P. 56 may be denied as moot. Defendant's motions for dismissal of the other counts pursuant to Fed. R. Civ. P. 12(c) still remain to be addressed, however.

B. DEFENDANT'S DISMISSAL MOTIONS

1. Legal Standard

In deciding a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), a court should apply the same standard as that applicable to a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim. *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.), *cert. denied*, 115 S. Ct. 73 (1994); *Ad-Hoc Comm. of Baruch Black and Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 835 F.2d 980, 982 (2d Cir. 1987). Under that test,

> a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief."

Sheppard, 18 F.3d at 150 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Furthermore, this standard is applied with particular strictness where, as here, the plaintiff complains of civil rights violations. *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991).

2. Plaintiff's Title VII Claim

Section 704(a) of Title VII provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter . . .." 42 U.S.C. § 2000e-3(a). The objective of this subsection "is obviously to

forbid an employer from retaliating against an employee because of the latter's opposition to an unlawful employment practice." *Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988). Section 703(a) of Title VII defines "unlawful employment practice" in this way:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ..

42 U.S.C. § 2000e-2(a)(1).

The *McDonnell Douglas* framework, established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), governs the order of proof in retaliation cases. *See Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980). Under this framework, an employee plaintiff must first establish his *prima facie* case. *Id.* Thus the employee must show "that [he or she] was engaged in protected activity; that the employer was aware of that activity; that the employee suffered adverse employment decisions; and that there was a causal connection between the protected activity and the adverse employment action." *Manoharan*, 842 F.2d at 593. If a plaintiff is successful in making out a *prima facie* case, the burden of production shifts to the defendant so that the defendant has an opportunity to articulate some legitimate, nonretaliatory reason for the adverse employment action. *Grant*, 622 F.2d at 46.

Contrary to plaintiff's stated belief, defendants clearly do not concede that she has satisfied the four-point test of *Manoharan* and established a *prima facie* case. Although defendants do appear to concede that they were aware of plaintiff's activity, that she suffered adverse employment decisions, and that a causal connection exists, they strenuously challenge the proposition that plaintiff's activity was protected by Title VII. Because plaintiff's theory that disparate impact discrimination would result from the layoffs was so meritless, defendants argue, plaintiff was not shielded when she wrote her infamous memo. The Court consequently must consider this issue to determine whether plaintiff has established a *prima facie* case.

It is well-settled that a finding of unlawful retaliation generally does not depend on the merits of the underlying discrimination complaint. *Davis v. State Univ. Of New York*, 802 F.2d 638, 642 (2d Cir. 1986); *James v. Runyon*, 843 F. Supp. 816, 825 (N.D.N.Y. 1994), *aff'd*, 47 F.3d 1158 (2d Cir.), *cert. denied*, 116 S. Ct. 126 (1995). However, the plaintiff in such an action "must demonstrate a 'good faith, reasonable belief that the underlying challenged actions of the employer violated the law.'" *Manoharan*, 842 F.2d at 593 (quoting *Abel v. Bonfanti*, 625 F. Supp. 263, 267 (S.D.N.Y. 1985)). When analyzing plaintiff's belief in this case, the Court must take into account the fact that she was acting not as a typical lay employee but rather as DEC's General Counsel. In other words, the Court will infer an absence of good faith on plaintiff's part if a reasonable *attorney* in plaintiff's position would not have believed that defendants' proposed downsizing violated the law.

Defendants make much of the fact that plaintiff has not submitted detailed statistical analyses to support her allegations of disparate impact. Even if she had, they also argue that because the relevant universe of employees is relatively small, such analysis would be meaningless, making it impossible for the employees to prove disparate impact discrimination with the requisite certainty. These arguments are not altogether convincing. Were it necessary, the Court conceivably could find that plaintiff had a good faith, reasonable belief that her activity was protected by Title VII notwithstanding the absence of detailed statistical analyses and the small employee group.[2]

It is not necessary, however, because defendants are convincing when they argue that plaintiff's memo was unreasonable "because Title VII expressly provides that an employer is not liable for the discriminatory effects of layoffs based on seniority." (Defs' Reply Mem. Supp. Dism. at 3.) Section 703(h) of Title VII provides, in pertinent part, that

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[2] First, a plaintiff in a disparate impact case must only offer statistical evidence of a kind and degree sufficient to show that the practice in question has a greater negative impact on a minority group. The Supreme Court has dictated that no particular mathematical formula must be implemented and satisfied. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). Instead, "[c]ases must be evaluated on their own terms." *Council 31, American Fed'n of State, County. & Mun. Employees v. Ward*, 978 F.2d 373, 379 (7th Cir. 1992) (citing *Watson*). Second, this is not a disparate impact case. It is a *retaliation* case, and thus plaintiff does not have to present the Court with evidence that would prove a Title VII violation. She only need demonstrate that it was reasonably possible that Title VII liability would result from defendants' downsizing plan.

> it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . ..

42 U.S.C. § 2000e-2(h). This section means that a showing of disparate impact is "insufficient to invalidate a [bona fide] seniority system." *Pullman Standard v. Swint*, 456 U.S. 273, 277 (1981).

Therefore, unless a seniority system was adopted with the intent to discriminate, its use cannot be an unlawful employment practice under Title VII's disparate impact theory even if it has some discriminatory consequences. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977). Defendants argue in this case that the New York Civil Service Law "last-hired, first fired" seniority provisions determined which DEC employees would be affected by the downsizing of their department. *See* N.Y. Civ. Serv. Law § 80.[3] Because

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[3] Section 80 dictates that

> Where because of economy, consolidation, or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished . . . suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs ....

N.Y. Civ. Serv. Law § 80(1).

this aspect of the Civil Service Law represents a bona fide seniority system and there is no evidence that the statute was adopted with intent to discriminate, defendants contend that plaintiff could not possibly have written her memo with a good faith, reasonable belief that it was protected by Title VII.

The Court agrees with defendants on this issue, because it difficult to conceive of a better example of a seniority system than the Civil Service Law's "last-hired, first-fired" rule. According to the Supreme Court, "the principal feature of any and every 'seniority system' is that preferential treatment is dispensed on the basis of some measure of time served in employment." *California Brewers Ass'n v. Bryant,* 444 U.S. 598, 606 (1980). Beyond that characteristic, every "bona fide seniority system" must meet certain requirements:

> [E]very seniority system must include rules that delineate how and when the seniority time clock begins ticking, as well as rules that specify how and when a particular person's seniority may be forfeited. Every seniority system must also have rules that define which passages of time "count" toward the accrual of seniority and which will not. Every seniority system must, moreover, contain rules that particularize the types of employment conditions that will be governed or influenced by seniority, and those that will not. Rules that serve these necessary purposes do not fall outside [Section] 703(h) simply because they do not, in and of themselves, operate on the basis of some factor involving the passage of time.

Id. The Civil Service system appears to include all these rules, and plaintiff has not argued to the contrary.

Defendants are correct that the Second Circuit posed and answered this question quite some time ago: "[D]oes a facially neutral excessing plan, which operates on the concept of 'last hired — first fired,' discriminate against minorities who are disproportionately affected? . . . [T]he answer to this question must be 'no'. *Chance v. Board of Examiners*, 534 F.2d 993, 997 (2d Cir. 1976) (holding that "last-hired, first-fired" seniority provisions are bona fide seniority systems under Title VII). In sum, Title VII was not intended to invalidate legitimate seniority systems and force employers to fire more senior, non-minority employees out of a concern for some vague notion of affirmative action or "diversity". 42 U.S.C. § 2000e-2(j) (entitled "Preferential treatment not to be granted on account of existing number or percentage imbalance"). *See also Manoharan*, 842 F.2d at 594 (finding that "affirmative action in employment practices is not required by Title VII").

Because plaintiff was General Counsel to DEC and personally determined who would have to be terminated under defendants' downsizing plan, she should have been keenly aware that Section 703(h) of Title VII applied to this case. *See* 42 U.S.C. § 2000e-2(h). The Court consequently can infer that plaintiff, in writing her memo to defendants, could not have had "a good faith, reasonable belief that the underlying challenged actions of the employer violated the law." *Manoharan*, 842 F.2d at 593. Even assuming plaintiff's allegations are true, she was not engaged in protected activity when she wrote the memo and has failed to establish a *prima facie* case of retaliatory discharge.

3. Plaintiff's First Amendment Claims

State officials may not discharge an employee for reasons that infringe on that employee's constitutionally protected

interest in freedom of speech. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In order for plaintiff to withstand defendants' motion to dismiss on the pleadings, she first must establish that her speech dealt with a matter of public concern and that the speech was a motivating factor in her discharge. *Frank v. Relin*, 1 F.3d 1317, 1330 (2d Cir.), *cert. denied*, 114 S. Ct. 604 (1993). Here, plaintiff's speech — in the form of her memo to defendants — clearly was a motivating factor in her discharge. Defendants admit, for example, that part of their justification for firing plaintiff was that her memo "reveals that she cannot be relied upon to deliver sound legal advice and to support management policy." (Defs' Reply Mem. Supp. Dism. At 9.) Thus the Court will concentrate on whether, assuming plaintiff's allegations are true, her memo was of public concern.

Speech can fairly be characterized as a matter of public concern if the speech "relat[es] to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). Plaintiff believes that the issues discussed in her memo "clearly touched upon matters of public concern . . . [because she] complained about the crippling effect a staff reduction would have on the Department, as well as the . . . disparate impact of the termination of minority employees . . .." (Pl.'s Mem. Opp. Dism. At 14.) On a perfunctory review plaintiff appears to be correct — her memo "relates" to issues about which the public might care. However, the Court cannot stop its analysis there, because whether speech involves a public concern is a question of law to be determined on the basis of "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48 & n.7.

Based on the whole record, the Court finds that plaintiff's memo was not protected speech because it did not deal with matters of public concern, as that term has been defined in the caselaw. Simply put, "the First Amendment does not, under ordinary circumstances, protect an at-will high-level policymaking employee from being fired because of job-related opinions and ideas [she] expresses as part of [her] employment." *Fender v. City of Oregon City*, 811 F. Supp. 554, 561 (D. Or. 1993), *aff'd*, 37 F.3d 1505 (9th Cir. 1994).

Plaintiff relies heavily on the balancing test enunciated in *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968), in support of her position. But the classic situation protected by the *Pickering* doctrine is a low-level public employee who expresses *personal* views on a matter of public concern that do not directly relate to the employee's work. *Fender*, 811 F. Supp. At 560. By contrast, plaintiff's memo was written in the course of her employment. Although budgetary and race issues can be a matter of public concern, plaintiff was not stating her personal views on the subjects but rather her views as Acting Deputy Commissioner and General Counsel of the DEC. Accordingly, her speech does not come under the umbrella of *Pickering*. *Id.*

Although not a Second Circuit case, *Fender* appears to be exactly on point. The court there explained its rationale in great detail:

> Government does not operate on a consensus basis. Policy-making employees are not free, in the course of their employment, to openly pursue goals that are contrary to those established by the governing body. . . Absent state law to the contrary, the Oregon City Commission is entitled

> to the services of a city manager who dances to the same music as the Commission. If the Commission disagrees with the policies advocated by the manager, the Commission has every right to replace him. Such considerations are at the very heart of the Supreme Court's balancing test [in *Pickering*]. Perhaps the public would be better served by allowing the manager to speak freely when he disagrees with the policies being pursued by the Commission. That is a matter for the legislature, not the courts.

Id., 811 F. Supp. at 561 (citations omitted). Here, the Governor and DEC Commissioner had decided to downsize plaintiff's department for budgetary reasons. Consequently they were entitled, without a doubt, to the services of an Acting Deputy Commissioner and General Counsel "who dances to the same music" as they do. Unfortunately for plaintiff (perhaps she would say *fortunately*), she dances to the beat of a different drummer.

Plaintiff is correct that there are circumstances where statements made in the course of employment have been found sufficiently meritorious that the scales tip in favor of First Amendment protection. *See, e.g., Frank,* 1 F.3d at 1329; *Piesco v. City of New York Dep't of Personnel,* 933 F.2d 1149, 1155 (2d Cir.), *cert. denied,* 502 U.S. 921 (1991). However, these cases can be distinguished from *Fender* and the present case because they typically deal with situations where the employee is engaged in "whistle-blowing," i.e., uncovering corruption and mismanagement that already exists in the employer's business and is being concealed. The plaintiff in *Frank,* for example, worked in a District Attorney's office and

was fired after informing a judge about perceived improprieties in the office's handling of criminal cases. *Frank*, 1 F.3d at 1320. Plaintiff here has not contended, and cannot seriously contend, that she wrote her memo acting as a whistle-blower.

Plaintiff also claims that she was deprived of her First Amendment right to petition for redress of grievances when she was terminated for writing her memo to defendants. This claim is equally without merit because the instant action provides plaintiff with a vehicle for redress of grievances. *Sheppard*, 18 F.3d at 152 (court action provides vehicle where plaintiff alleges violation of right to seek redress of grievances).

4. Qualified Immunity Defense

Defendants argue that they cannot be held liable for damages on plaintiff's remaining First Amendment claims because they are protected by the qualified, or good faith, immunity doctrine. Contrary to plaintiff's apparent belief, defendants do not contend that they are immune from liability under Title VII. Qualified immunity is a creature of Section 1983 jurisprudence, and only plaintiff's First Amendment claims were brought pursuant to Section 1983. The Supreme Court has emphasized the importance of resolving the issue of qualified immunity early in the proceedings. Whether qualified immunity is applicable is a question of law, not fact, for the trial judge to resolve long before any trial. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

Section 1983 is written in absolute terms: it creates liability for any person, acting under color of state law, who violates the Constitution and laws of the United States. No exceptions

are mentioned in the statute. However, the Supreme Court consistently has held that all officers of the state possess some degree of immunity from liability. In the Court's eyes, the possibility of immunity for individuals is imperative because of "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984). Moreover, there has been concern that the absence of immunity might make it more difficult to attract people into government service, or at least might chill the exercise of discretion. *Id.*

Thus the Supreme Court has seen a need to strike a balance; the immunity standard must provide sufficient liability to ensure compensation and deterrence, while according immunities adequate to encourage government employees to perform their duties. In some cases, such as where the state officer is performing judicial, legislative, or prosecutorial functions, this balancing leads to the conclusion that the officer is entitled to absolute immunity. *See, e.g., Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 418-424 (1976). If officers are not performing one of the functions accorded absolute immunity, however, they consequently are entitled to the possibility of qualified immunity. In the present case, presumably because of the nature of their positions and the actions they have taken, defendants seek qualified immunity.

The fundamental question concerning qualified immunity revolves around the definition of "good faith." The ability of many injured plaintiffs, such as plaintiff here, to recover will turn on the standard for determining good faith. The Supreme

Court has developed and modified the standard over many years. *See Scheuer*, 416 U.S. at 232; *Wood v. Strickland*, 420 U.S. 308, 321 (1975). These earlier cases contained both an objective component (was the act reasonable?) and a subjective component (did the state officer believe it was reasonable?). Thus a plaintiff could refute the existence of good faith either by demonstrating that a reasonable state officer would find the action impermissible or by showing that the particular officer in question knew that his action was unreasonable. *See Wood*, 420 U.S. at 321-22.

In 1982, the Court substantially reformulated the test again. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *Harlow* held that malice, or subjective bad faith, on the part of government officials was no longer relevant in overcoming a claim of immunity. In other words, the Court expressly discarded one element of the two-part standard enunciated in *Scheuer* and *Wood*. In the Court's view it was too easy for plaintiffs to allege malice with the hope of finding evidence during discovery. Additionally, it was too difficult for trial courts to grant summary judgment on the malice question because subjective intent is a factual question that usually requires a trial. *Harlow*, 457 U.S. at 816-17. In sum, *Harlow* articulated the test that still controls today: "government officials performing discretionary functions . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

The Supreme Court clarified matters even further in *Anderson v. Creighton*, 483 U.S. 635, 636-38 (1987). In *Anderson*, the defendant, an FBI agent, conducted a

warrantless search of the plaintiff's home because the agent erroneously thought that bank robbers were hiding there. The Eighth Circuit denied the defendant qualified immunity because the law was settled that warrantless searches could not be performed without probable cause and exigent circumstances. The Supreme Court, however, reversed. Justice Scalia wrote that good faith immunity is not lost when a state officer violates the Fourth Amendment unless a reasonable state officer in the same position would know that the conduct in question was impermissible. Although the First Amendment rather than the Fourth Amendment is involved here, the standard is the same: a state officer "may [not] be held personally liable for money damages if a reasonable [state] officer could have believed that the [action] comported with the [First] Amendment." *Cf. Id.* at 636-37 (dealing with Fourth Amendment).

The Court has already determined that defendants' action in firing plaintiff did in fact comport with the First Amendment, so it follows that a reasonable state officer could have believed that the firing did not violate plaintiff's First Amendment rights. However, even if plaintiff's memo were found to represent speech protected by the First Amendment, the Court believes that (1) the law is sufficiently murky or (2) the factual question is sufficiently close that a reasonable state officer could *still* believe that plaintiff's firing was permissible under the Constitution. Either way, therefore, defendants are entitled to qualified immunity from liability in regard to plaintiff's First Amendment claims.

IV. CONCLUSION

Plaintiff has withdrawn her Third Cause of Action, under which she claimed that defendants' conduct violated her First Amendment right of association. Furthermore, even assuming the facts as alleged by plaintiff are true, she has failed to state a cause of action based on retaliatory discharge because she did not have a good faith, reasonable belief that her memo was protected by Title VII. Finally, defendants are qualifiedly immune from liability in regard to plaintiff's First Amendment claims. With no federal basis remaining, the Court declines to exercise jurisdiction over plaintiff's state law claims. For all the foregoing reasons, defendants' motion for judgment on the pleadings is hereby GRANTED and plaintiff's Complaint is DISMISSED.

IT IS SO ORDERED.

February 27, 1996
Binghamton, New York

Thomas J. McAvoy/Signature
HON. THOMAS J. McAVOY
Chief U.S. District Judge

APPENDIX C

United States District Court

NORTHERN DISTRICT OF NEW YORK

/Stamp/
U.S. District Court
N.D. of N.Y.
Original Filed Aug. 31, 1995
George A. Ray, Clerk
Albany

DEBORAH I. VOLBERG,

Plaintiff,

-against-

GEORGE E. PATAKI, individually and as Governor of the State of New York, CONSTANCE KELLOGG-BARRELLA, individually and as Deputy Commissioner of the New York State Department of Environmental Conservation, FRANK BIFERA, individually and as Acting General Counsel to the Department of Environmental Conservation, MICHAEL FINNEGAN, individually and in his capacity as Counsel to the Governor, and GAVIN DONOHUE, individually and in his capacity as Special Assistant,

Defendants.

95 Civ. 1095 (TJM/DS)
FIRST AMENDED COMPLAINT
Jury Trial Demanded

Plaintiff DEBORAH I. VOLBERG, by her attorneys Lovett & Gould, Esqs., as and for her complaint herein respectfully alleges:

NATURE OF THE ACTION

1. This is an action for deprivations by Defendants, acting in concert and under color of law, of Plaintiff's rights, privileges and immunities as guaranteed her by reason of the First Amendment to the United States Constitution, 42 U.S.C. 1983, and Title VII, 42 U.S.C. 2000e-3(a).

JURISDICTION

2. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1331 and 1343(a)(3). Plaintiff's state law claims are interposed in accordance with the Court's pendent jurisdiction. On February 28, 1995, Plaintiff filed a charge of discrimination (#160-95-1107) with the Equal Employment Opportunity Commission in which charge she alleged that her firing was retaliatory and violative of 42 U.S.C. §2000e-3(a). By letter dated August 25, 1995, the United States Department of Justice, Civil Rights Division, issued a so-called Right to Sue letter.

THE PARTIES

3. Plaintiff DEBORAH I. VOLBERG is a citizen of the United States, a domiciliary of the State of New York, and a resident of the City of White Plains, New York. At all times relevant to this complaint she was employed as an attorney in the New York State Department of Environmental Conservation. At no time did Plaintiff hold any position of employment with the Department of Environmental Conservation by reason of which political affiliation was in any way related to and/or necessary for the satisfactory fulfillment by Plaintiff of her job responsibilities. In fact,

partisan politics is antithetical to both conservation of the environment and proper enforcement of the State's statutory and regulatory scheme designed for that purpose.

4. Defendant GEORGE E. PATAKI (hereinafter "Pataki"), who is sued individually and officially, at all times relevant to this complaint was the duly elected Governor of the State of New York. With respect to the facts alleged *infra* Pataki acted under color of law, was and acted as a policy maker for the State of New York, and engaged in the alleged conduct in concert with his co-defendants pursuant to a common plan, with the specific intent to subject Plaintiff and all persons similarly situated to the constitutional deprivations set forth *infra*.

5. Defendant CONSTANCE KELLOGG-BARRELLA (hereinafter "Barrella"), who is sued individually and officially, at all times relevant to this complaint was the duly appointed Deputy Commissioner of the New York State Department of Environmental Conservation, a position of employment she obtained by reason of her familial relationship to Defendant Finnegan, her brother-in-law. With respect to the factual allegations set forth *infra* Barrella acted under color of law, as a policy maker for the State, in concert with her co-defendants, pursuant to a common plan, and with the specific intent to subject Plaintiff and others similarly situated to the constitutional deprivations alleged *infra*.

6. Defendant MICHAEL FINNEGAN (hereafter "Finnegan"), who is sued individually and officially, at all times relevant to this complaint was an intimate advisor of Defendant Pataki, served as Pataki's campaign manager during the 1994 election campaign by reason of which Pataki

was first elected Governor, and serves as Counsel to the Governor. With respect to the factual allegations set forth *infra* Finnegan acted under color of law, as a policy maker for the State, in concert with his co-defendants, pursuant to a common plan, and with the specific intent to subject Plaintiff and others similarly situated to the constitutional deprivations alleged *infra*.

7. Defendant GAVIN DONOHUE (hereinafter "Donohue"), who is sued individually and officially, at all times relevant to this complaint was the so-called Special Assistant to Defendant Barrella. With respect to the allegations of fact set forth *infra* Donohue acted under color of law, in concert with his co-defendants, pursuant to a common plan, and with the specific intent to subject Plaintiff and others similarly situated to the constitutional deprivations set forth *infra*.

8. Defendant FRANK BIFERA (hereinafter "Bifera"), who is sued individually and officially, at all times relevant to this complaint was the Acting Division Director for Environmental Enforcement and/or the Acting General Counsel for the Department of Environmental Conservation. With respect to the allegations of the complaint Bifera acted under color of law, in concert with his co-defendants, pursuant to a common plan, and with the specific intent to subject Plaintiff and persons similarly situated to the constitutional deprivations set forth *infra*.

THE FACTS

9. Plaintiff, until February 22, 1995, was a long-term career attorney who has been employed by the State of New York,

first in the office of the Attorney General, and thereafter in the Department of Environmental Conservation. She has, in all employment capacities with the State, performed in a superior manner and has consistently received excellent job performance evaluations, promotions, and salary increments commensurate with her skills and the quality of her job performance.

10. During the 1994 election campaign for governor Plaintiff, a registered Democrat, publicly supported the candidacy of then incumbent Democratic Governor Mario Cuomo out of her belief that Pataki would make a worse governor than Cuomo had.

11. On or about November 5, 1994, Republican candidate Pataki, with the active assistance of his co-defendants, won election as Governor of the State of New York as a Republican.

12. As a proximate result of Pataki's election victory, Defendants entered into a scheme, conspiracy and/or plan (hereafter "plan") to terminate the State employment of hundreds of persons known to have supported Cuomo and/or known to have associated with and/or advocated the election of Democratic candidates in order to replace them on a spoils system premise, with relatives and/or friends and/or campaign hangers-on who were registered Republicans.

13. In furtherance of Defendants' plan and commencing early in January of 1995, lists of *inter alia* targeted minority employees were drawn up and orders were issued by Defendants requiring the termination of the those [sic]employees' employment. When the attorney who supervised Plaintiff was removed from his job position, Plaintiff was directed to temporarily assume his supervisory

responsibilities which included the giving of notice to co-workers that they were for partisan political reasons being fired.

14. Out of a deep personal conviction that political firings were improper, would grossly impair the administration of the Office of General Counsel to the Department of Environmental Conservation, and would within the Department of Environmental Conservation result in a grossly disparate impact on the few minority employees of that Department, Plaintiff on or about February 22, 1995, wrote to Barrella, Donohue and other policy makers in the Pataki Administration in order to express her opinion regarding these matters of serious public concern. In relevant part she advised:

> I submitted to Nancy Lussier, at her request, on February 20, 1995 a copy of the attached memorandum specifying 7 attorney positions to be eliminated. It was my understanding that I could target both regional and central office attorneys, as well as either exempt, non-competitive or competitive. After being directed to select 7 attorney positions, after careful review, I chose positions to target—based on my best professional judgment—whose elimination would have the least impact on the ability of the OGC [Office of General Counsel] to carry out its mandate to provide legal counsel to the Executive Staff, programs and the public.
>
> Today, Judy Hogue advised me, and you confirmed in our conversation this afternoon, that I am directed to target only competitive class positions. Again in my best professional

judgment, this would cripple OGC's and the Department's ability to provide adequate services.

Moreover, the end result of that exercise would be the loss of most of our minority attorneys, who are our most recent hires. As I advised you this afternoon, such an action might expose this agency, and individuals involved in the termination decisions, to liability under the federal Civil Rights Act, Titles VI and VII.

Over the last two years, OGC has made a concerted effort to recruit and hire minority attorneys, as we had previously no minority attorneys in our office. In the last two years, we hired six minority attorneys. As a result of Ann DeBarbieri's termination as a Deputy Commissioner, she is bumping back down into OGC, and bumping out Rosanne Nichols (a minority). If we target competitive class positions within the Central Office, the next two vulnerable attorneys would be Monica Abreu and Shakira Gafar, both minorities.(I understand that Ms. Gafar submitted her resignation today; that renders Scott Crisafulli, not a minority, vulnerable.) If I target competitive class positions in the regions (a separate bumping pool), the most vulnerable attorneys would be Murali Balachandran (a minority) and Jeanna Hussey (a minority). Not including Ms. Gafar who is leaving voluntarily, we will have lost, as a result of the recent layoffs and targeting competitive

class positions, three minority attorneys (out of a remaining five).

At your request, I have attached a list of all remaining exempt positions in OGC. I have also attached two proposed lists of cuts: one ("A") which would target only the exempt positions which you indicated were permissible (McCloskey and Ferrentino), and five competitive class attorneys (including Ms. Gafar and Ms. Abreu); and the other ("B") which would target Ms. Kamaras, an exempt position, rather than Ms. Abreau. Ms. Kamaras today advised me that on March 9, 1995, she will be resigning effective March 22, 1995. If we target Ms. Kamaras' position rather than Ms. Abreu's, we would lose 2 rather than 3 minority attorneys.

15. Substantially motivated to retaliate against Plaintiff because of her political affiliation and/or because she had advocated Cuomo's defeat of Pataki and/or because she had expressed her opposition to the disparate impact upon minorities of Defendants' partisan political job termination scheme, Defendants agreed to and then summarily terminated Plaintiff's employment on February 22, 1995.

16. At the time Defendants terminated Plaintiff's employment, they knew that Plaintiff could not be lawfully fired by reason of her political affiliation and/or her opposition to Defendants' targeting of minority staff for firing, and that such a termination would violate Plaintiff's rights as guaranteed her by reason of the First Amendment and 42 U.S.C. 2000e-3(a). In willful disregard of those rights,

Defendants knowingly ended Plaintiff's employment relationship with the State with the specific intent to punish her by reason of her political affiliation, and/or her exercise of her associational rights, and/or her opposition to the targeting of minority staff for firing.

17. As a proximate result of Defendants' conduct Plaintiff has been damaged financially, has purposefully been denied her right to free speech, has purposefully been denied her rights of association, has purposefully had breached her right to be free from retaliation because of her opposition to violations of Title VII [42 U.S.C. §2000e *et seq.*], has purposefully been retaliated against because she petitioned government for the redress of grievances, has been willfully subjected to severe emotional distress, has been embarrassed, publicly held up to ridicule, been degraded and otherwise made sick and sore.

AS AND FOR A FIRST CLAIM

18. Repeats and realleges as if fully set forth the allegations of fact contained in paragraphs "1" to "17" inclusive.

19. At the time Plaintiff expressed her opinion with respect to Defendants' targeting of minority employees for termination, she reasonably believed in good faith that Defendants' conduct violated Title VII, 42 U.S.C. §2000e *et seq.*

20. Under the premises Defendants' retaliatory firing of Plaintiff constituted an unlawful employment practice violative of 42 U.S.C. 2000e-3.

AS AND FOR A SECOND CLAIM

21. Repeats and realleges as if fully set forth the factual allegations contained in paragraphs "1" to "17" inclusive.

22. Under the premises Defendants' conduct violated Plaintiff's right of free speech as guaranteed her by reason of the First Amendment to the United States Constitution, 42 U.S.C. §1983.

AS AND FOR A THIRD CLAIM

23. Repeats and realleges as if fully set forth the allegations of fact contained in paragraphs "1" to "17" inclusive.

24. Under the premises Defendants' retaliatory conduct violated Plaintiff's right of association as guaranteed her by reason of the First Amendment to the United States Constitution, 42 U.S.C. §1983.

AS AND FOR A FOURTH CLAIM

25. Repeats and realleges as if fully set forth the allegations of fact contained in paragraphs "1" to "17" inclusive.

26. Under the premises Defendants' conduct violated Plaintiff's right to petition government for the redress of grievances, as guaranteed her by reason of the First Amendment to the United States Constitution, 42 U.S.C. §1983.

AS AND FOR A FIFTH CLAIM

27. Repeats and realleges as if fully set forth the allegations of fact contained in paragraphs "1" to "17" inclusive.

28. Under the premises Defendants' conduct violated Plaintiff's right to free speech as guaranteed her by reason of Article I, Section 8 of the New York State Constitution.

AS AND FOR A SIXTH CLAIM

29. Repeats and realleges as if fully set forth the allegations of fact contained in paragraphs "1" to "17" inclusive.

30. Under the premises Defendants' conduct violated Plaintiff's right to petition government for the redress of grievances as guaranteed her by reason of Article I, Section 9 of the New York State Constitution.

AS AND FOR A SEVENTH CLAIM

31. Repeats and realleges as if fully set forth the allegations of fact contained in paragraphs "1" to "17" inclusive.

32. Under the premises Defendants' conduct violated Plaintiff's right to petition government for the redress of grievances which right is guaranteed her by reason of Section 15 of the New York State Civil Rights Law.

AS AND FOR AN EIGHTH CLAIM

33. Repeats and realleges as if fully set forth the factual allegations contained in paragraphs "1" to "17" inclusive.

34. Under the premises Defendants' conduct violated Plaintiff's right to be free from retaliation for having opposed unlawful discriminatory practices in the workplace as guaranteed her by reason of Sections 296 *et seq.* of the New York State Executive Law.

WHEREFORE judgment is respectfully demanded:

a. With respect to the First Claim, awarding as against all of the Defendants such compensatory damages as the jury may determine.

b. With respect to the First Claim, awarding against all of the Defendants such punitive damages as the jury may impose.

c. With respect to the Second, Third, Fourth, Fifth, Sixth and Seventh Claims, awarding against the individual Defendants such compensatory and punitive damages as the jury may determine.

d. With respect to the Eighth Claim awarding as against the individual Defendants such compensatory damages as the jury may determine.

e. Declaring that Defendants' termination of Plaintiff because she opposed discriminatory practices in the workplace violated Title VII, 42 U.S.C. 2000e *et seq.*

f. Declaring that Defendants' termination of Plaintiff because she was a registered Democrat and/or advocated the election of Mario Cuomo as opposed

to Pataki, violated Plaintiff's right to free speech and association.

g. Directing Plaintiff's retroactive reinstatement with an award of back pay and the granting of such seniority and/or other benefits as would have accrued to her but for her unlawful termination.

h. Awarding reasonable attorney's fees and costs, and

g. Granting such other and further relief as to the Court may seem just.

Dated: White Plains, N.Y.
August 29, 1995

LOVETT & GOULD, ESQS.
Jonathan Lovett/signature
Jonathan Lovett (4854)
Bar Code 507764
Attorneys for Plaintiff
11 Martine Avenue
White Plains, N.Y. 10606
914-428-8401

APPENDIX D

United States District Court

NORTHERN DISTRICT OF NEW YORK

DEBORAH I. VOLBERG,

Plaintiff,

-against-

GEORGE E. PATAKI, individually and as Governor of the State of New York; CONSTANCE KELLOGG-BARRELLA, individually and as Deputy Commissioner of the New York State Department of Environmental Conservation; FRANK BIFERA, individually and as Acting General Counsel to the Department of Environmental Conservation; MICHAEL FINNEGAN, individually and in his capacity as Counsel to the Governor; and GAVIN DONOHUE, individually and in his capacity as Special Assistant,

Defendants.

NOTICE OF MOTION
95 Civ. 1095 (TJM/DS)

PLEASE TAKE NOTICE that upon the annexed affidavit of Frank V. Bifera; the accompanying memorandum of law; and upon all prior proceedings, defendants, on ___, 1996 at 9:30 a.m., will make a motion at the United States District Court, Northern District of New York, in either Binghamton, NY or Albany, NY, for an order pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure, granting partial judgment on the pleadings and partial summary judgment in favor of defendants on the grounds that the complaint fails to state a valid claim for relief and that there is no genuine issue

as to any material fact and that defendants are entitled to judgment as a matter of law.

Dated: Albany, New York
December 11, 1995

DENNIS C. VACCO
Attorney General of
the State of New York
Attorney for Defendants

Darren O'Connor/signature
Darren O'Connor
Assistant Attorney General
Bar Roll No. 102281
The Capitol
Albany, New York 12224
(518) 474-4866

To: JONATHAN LOVETT, ESQ.
Lovett & Gould
11 Martine Avenue
White Plains, NY 10606

APPENDIX E

United States District Court

NORTHERN DISTRICT OF NEW YORK

DEBORAH I. VOLBERG,

Plaintiff,

-against-

GEORGE E. PATAKI, individually and as Governor of the State of New York; CONSTANCE KELLOGG-BARRELLA, individually and as Deputy Commissioner of the New York State Department of Environmental Conservation; FRANK V. BIFERA, individually and as Acting General Counsel to the Department of Environmental Conservation; MICHAEL FINNEGAN, individually and in his capacity as Counsel to the Governor; and GAVIN DONOHUE, individually and in his capacity as Special Assistant,

Defendants.

AFFIDAVIT
No. 95-CV-1095 (TJM/DS)

STATE OF NEW YORK}
}SS.:
COUNTY OF ALBANY}

FRANK V. BIFERA, being duly sworn, deposes and says:

1. I am the Acting General Counsel in the New York State Department of Environmental Conservation, and am a defendant in this action. This affidavit is

submitted in support of defendants' motion for summary judgment.

2. Early in 1993, the Department had an opening for the position of Deputy Counsel and Director of Legal Affairs. Plaintiff had for many years worked with the Office of the Attorney General in the environmental field, and she applied for the job. The Department hired her in February 1993. Attached as Exhibit A is plaintiff's probation evaluation, which lists plaintiff's duties in the position.

3. State employees are generally divided into four classes: exempt; non-competitive; labor; and competitive. Since the plaintiff's position required the trust and confidence of the Commissioner, it was classified as "exempt". An employee in such a position does not obtain "tenure" and is not protected from termination by the Civil Service Law. Civil Service Law §§41, 75. Plaintiff never objected to her classification as an exempt employee.

4. The position held by plaintiff has been designated as policy-making pursuant to section 73-a of the Public Officers Law. She was, therefore, required to file annual financial disclosure forms with the New York State Ethics Commission revealing a broad array of information concerning associations with private organizations, investments, sources of gifts, interests in trusts and estates, liabilities, etc. Plaintiff was repeatedly notified that because of the nature of her duties, she was a policy-maker under the Ethics in Government Act, and she never

challenged this designation. Copies of the notifications are attached as Exhibit B.

5. The Department set plaintiff's initial annual salary at $72,473, and she began working at the Department on or about February 18, 1993. Two years later, the Commissioner appointed plaintiff as Acting Deputy Commissioner and General Counsel. Attached as Exhibit C is the formal document recording this designation and listing plaintiff's responsibilities as General Counsel.

6. The Department dismissed plaintiff effective at the close of business on March 17, 1995. Her salary at that time was $80,188.

Frank V. Bifera/signature
FRANK V. BIFERA

Sworn to me this
1st day of December, 1995.

Joseph H. Looby/signature
Notary Public

/stamp/
Joseph H. Looby
Notary Public, State of New York
Qualified in Albany Co.
Reg. No. 02LO5037410
Commission Expires 01/17/97

United States District Court

NORTHERN DISTRICT OF NEW YORK

DEBORAH I. VOLBERG,

Plaintiff,

-against-

GEORGE E. PATAKI, individually and as Governor of the State of New York, CONSTANCE KELLOGG-BARRELLA, individually and as Deputy Commissioner of the New York State Department of Environmental Conservation; FRANK BIFERA, individually and as Acting General Counsel to the Department of Environmental Conservation, MICHAEL FINNEGAN, individually and in his capacity as Counsel to the Governor, and GAVIN DONOHUE, individually and in his capacity as Special Assistant,

Defendants.

NOTICE OF MOTION
No. 95-CV-1095 (TJM/DS)

PLEASE TAKE NOTICE that upon the annexed affidavit of Frank V. Bifera; the accompanying memorandum of law; and upon all prior proceedings, defendants, on ___, 1996 at 9:30 a.m., will make a motion at the United States District Court, Northern District of New York, in either Binghamton, NY or Albany, NY, for an order pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure, granting partial judgment on the pleadings and partial summary judgment in favor of defendants on the grounds that the complaint fails to state a valid claim for relief and that there is no genuine issue

as to any material fact and that defendants are entitled to judgment as a matter of law.

Dated: Albany, New York
December 11, 1995

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Defendants

By: Darren O'Connor/signature

Darren O'Connor
Assistant Attorney General
Bar Roll No. 102281
The Capitol
Albany, New York 12224
(518) 474-4866

To: JONATHAN LOVETT, ESQ.
Lovett & Gould
11 Martine Avenue
White Plains, NY 10606

EXHIBIT A

Management/Confidential
INDIVIDUAL PERFORMANCE PROGRAM
Performance Evaluation System

SECTION 1 — EMPLOYEE IDENTIFICATION

Evaluation Period Ending July 1, 1993

Employee's Name Deborah I. Volberg
Item Number 23202

Title and Grade Deputy Counsel/Director, G66
Social Security Number 049-50-6456

Agency Environmental Conservation
Facility/Division Legal Affairs

SECTION 2 — PERFORMANCE PROGRAM
(Attach additional sheets if necessary.)

A. TASKS/OBJECTIVES: List the major tasks, assignments, activities, and results to be achieved during the evaluation period.

1. See attached

B. PERFORMANCE STANDARDS: List observable criteria for determining if objectives/tasks are fully met/performed. Criteria should be quantitative wherever possible.

1. See attached.

SECTION 3 — CERTIFICATION

We have met to discuss the objectives, tasks, assignments and activities indicated above. This performance program is

the basis upon which job performance will be appraised and rated on the annual rating date. The employee has had an opportunity to submit proposed tasks and standards for consideration in the performance program.

Supervisor _____(SIGNATURE)(DATE)
Employee _____(SIGNATURE)(DATE)

I have attached written comments concerning the performance program. (Optional on the part of the employee.)

SECTION 4 — SIX-MONTH RECERTIFICATION

We met within one month before or after the mid-point of the rating period to discuss the employee's performance, and to reaffirm or revise the program. (If revised, revisions are attached.) If a rating were assigned today based upon service to date, I would propose that it be (Supervisor fills in one of the five rating categories.) This is not a rating; therefore, it is not appealable.

Supervisor _____ (SIGNATURE)(DATE)
Employee _____ (SIGNATURE)(DATE)

Management/Confidential
PERFORMANCE APPRAISAL AND RATING
Performance Evaluation System

SECTION 1 — SUMMARY OF PERFORMANCE

Describe the employee's performance in accomplishing tasks or achieving objectives specified in the Individual Performance Program. Explain how the employee's performance has exceeded or not met the performance standards. Be as specific and quantitative as possible.

1. See attached.

(Attach additional sheets if necessary)

SECTION 2 — RECOMMENDED TRAINING, DEVELOPMENT, AND PERFORMANCE IMPROVEMENT ACTIVITIES

SECTION 3 — PERFORMANCE RATING

(Check One.)

Highly Effective

Supervisor Marc Gerstman/signature
Signature Marc Gerstman/signature Date 12/15/93

Reviewer /signature Signature /signature Date 12/17/93

(Optional unless rating is "Outstanding" or "Unsatisfactory" or otherwise specifically required by the agency.)

SECTION 4 — CERTIFICATION

I met with my supervisor on 12/15/93 to discuss my job performance. I have had an opportunity to read this appraisal and discuss it with my supervisor. My signature does not necessarily signify agreement.

Employee Deborah I. Volberg/signature Date 12/15/93

I have attached written comments concerning the performance appraisal. (Optional on part of the employee.)

NOTE: If the rating is Unsatisfactory and you wish to appeal, you have 15 calendar days from receipt of the rating to submit

an appeal. Contact your Personnel Office for specific procedures.

DEBORAH VOLBERG
EVAL. PERIOD ENDING: July 1, 1993
SECTION 2 — PERFORMANCE PROGRAM

A. Tasks/Objectives

1. Direction of Division

   - Responsible for delivery of legal services program;

   - Supervise Bureau Chiefs in fulfilling client counseling; and managing caseloads;

   - Set priorities for staff attorneys;

   - Ensure coordination of activities among Bureaus, and all other units of the Department; and

   - Request and allocate Division's fiscal and personnel resources.

2. Advice to Executive - Provide legal advice and analyses to Executive.

3. Relationship With Clients - Ensure that program staff and managers have ready access to program attorneys, and that legal advice rendered is timely and sound.

4. Relationship With Staff Attorneys - Foster a professional relationship, earning respect of staff attorneys and making provision for their professional growth.

5. Liaison With Other Governmental Staff and With the Public - Maintain good working relationship with other agencies and act as effective spokesperson for the Department's legal office.

B. Performance Standards:

1. Oversees all operation of the Division of Legal Affairs, including:

   - Ensured that legal opinions are sound and timely rendered;

   - Allocated caseloads of Bureau Chiefs and staff attorneys as evenly as practicable;

   - Setting priorities consistent with direction from the Executive Office and Program Division Directors and Regional Directors;

   - Ensuring coordination of activities among Bureaus and all other units of the Department; and

   - Directing staff resources in a manner which accomplishes departmental objectives within fiscal restraints.

2. Advice rendered is based on sound legal analyses, reflects good judgment, is timely, and takes into consideration departmental and statewide policies.

3. Clients, including program staff and program managers, have ready access to program attorneys to consult on legal issues relating to programmatic concerns; programs are encouraged to provide early

notice of the need for legal involvement; programs rely on advice given.

4. Division Director is looked to for guidance by Bureau Chiefs and staff attorneys. Her judgment and lawyering skills are respected.

5. Is able to communicate effectively with personnel of other governmental agencies and to work with them to further the State's environmental goals; exhibits leadership qualities; demonstrates knowledge of a broad range of environmental issues.

DEBORAH VOLBERG
EVALUATION PERIOD ENDING JULY 1, 1993

A. SUMMARY OF PERFORMANCE

1. Ms. Volberg has been the Director of Legal Affairs since February, 1993. In her first 5-6 months, Ms. Volberg has made tremendous strides toward learning the issues, organization and people of DLA and DEC, no small undertaking. She has reached out to her staff to establish an understanding of the role of the program attorney. Ms. Volberg has worked incredibly hard to meet the objectives of overall direction of the Division. Nonetheless, due to her short tenure, Ms. Volberg primarily (and understandably) devoted herself to self-education. During the transition period, Ms. Volberg was able to maintain the high volume of work generated by the Division without any major disruption in output. Ms. Volberg began work with the Bureau Chiefs toward prioritization of the attorneys work. Again, due to her short tenure during this evaluation period, much of the

direction came from the General Counsel. The involvement of the Director and Bureau Chiefs in setting priorities and triaging work product must be the most important goal to be achieved during the next evaluation period.

Ms. Volberg demonstrated a sound instinct for reaching the critical issues and working toward a reasonable legal conclusion of outstanding matters. As Ms. Volberg becomes more acquainted with the Agency, there will be greater expectation for more complete coordination with affected divisions and regions. Ms. Volberg did an effective job at following the progress of work through the Division, however, the need for greater effort to oversee the Division's workload will be necessary for the next year. (A computer notebook will surely help.)

2. Ms. Volberg's legal advice to the client entities is sound and based on a thorough examination of the facts and program objectives to be achieved. Ms. Volberg was involved in some significant matters during this evaluation period. The outstanding effort and the results reached in these matters (e.g. Westhampton) were due to Ms. Volberg's skills in bringing legal analyses and negotiation talent to bear on the issues. Ms. Volberg's legal skills have hereforeto been litigation oriented. A different approach is sometimes required in the Agency in order to reach the appropriate balance of legal, policy and programmatic interests.

3. Ms. Volberg has gained the confidence of the Commissioner and Executive Deputy and key members of the executive staff in providing legal advice. The feedback from the regions has been equally good. A continued effort to reach

out to the clients in the central office and regions is an important priority.

4. Generally, the attorneys on staff respect Ms. Volberg's legal advice and judgment. During this transition period, Ms. Volberg may have questioned attorneys based on her need to understand more fully the issues presented. As her knowledge grows, any misunderstanding resulting from this questioning will diminish. Attorneys expect that their work will be afforded high priority. With greater understanding of the issues, the review time will decrease, as will any frustration that arises from delayed review. Ms. Volberg has demonstrated an ability to bring attorneys together to work as a team on important issues, a trait that is critical for the Office to work.

5. Ms. Volberg's strong relationship with the Attorney General's office has helped heal long standing tensions. Her litigation judgment is unquestioned and assists the Department in achieving the desired litigation strategy at the AG's Office.

GENERAL COMMENTS

Ms. Volberg is off to a fine start as DLA Director. From the perspective of the General Counsel, Ms. Volberg is easy to work with, maintains the confidences of the General Counsel and Commissioner, and represents the General Counsel in a professional and collegial way. As indicated above, with greater understanding of the Office and agency, many of the issues raised will cease to be of concern. Keep up the good work.

EXHIBIT B

LOGO

State of New York
Department of Environmental Conservation
Albany, New York 12233-1010
Langdon Marsh
Commissioner/letterhead

Dear Ms. Volberg:

As you may know, the financial disclosure provisions of the Ethics in Government Act apply to State officers and employees who receive annual compensation in excess of $58,198 or hold policy making positions [Public Officers Law, Section 73-a.1.(c)]. The Act requires that all those with appointing authority in the State to designate which appointees are "policymakers". Because of the nature of their positions and responsibilities, policymakers must submit annual financial disclosure forms, regardless of the salary that they receive from the State.

The Ethics Commission issued guidelines that stated that a policymaking position is one which:

(a) has been determined to be managerial pursuant to subdivision 7 of Section 201 of the Civil Service Law because he or she formulates policy; or

(b) is in the non-competitive class under Section 2.2 of the classified service of the State of New York and, in Appendix 2 of the rules and regulations of the Department of Civil Service, is designated by the symbol ϕ on the basis that it requires the performance of functions influencing policy; or

(c) exercises responsibilities of a broad scope in the formulation of plans for the implementation of goals or policy for a state agency or acts as an advisor to an individual in such a position.

A State agency includes "any state department, or division, board, commission or bureau of any state department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the governor, or the state university of New York or the city university of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the state." [Public Officers Law, Section 73-a.1.(b)].

Because of the nature of your duties, it has been determined that you are a policymaker under the provisions of the Ethics in Government Act. This status means that you will be required to file a financial disclosure form, which the Ethics Commission will distribute in the beginning of April and which will be due on or before May 15. For your information, the content of the form is set forth in Section 73-a of the Public Officers Law. Additionally, the Ethics Commission has proposed regulations which would require policymakers to receive approval for outside activities. Copies of the regulations have been distributed to Division and Regional Directors.

In addition, O&D Memorandum 92-28 presently requires that Department employees carefully review their own outside activities for a potential conflict of interest and bring any outside activity which *may* present a conflict to the attention of their supervisor. In particular, it is important to closely scrutinize membership on governing boards of organizations

which do business with the Department, lobby the Department, or are regulated by the Department, as well as political activities or office holding. Any questions should be referred through the supervisory chain to the Office of General Counsel.

If you have any questions concerning the completion of the disclosure forms, you should write to the State Ethics Commission, 39 Columbia Street, 4th Floor, Albany, New York 12207 or call them at 518-432-8207.

I thank you for the service that you render to the Department of Environmental Conservation and for the attention you will give to the disclosure procedure to ensure integrity in government.

Sincerely,
Langdon Marsh/signature
Langdon Marsh

Ms. Deborah I. Volberg
353 Mountain Street
Albany, NY 12208

APR 06 1993/stamp

Dear Ms. Volberg:

As you may know, the financial disclosure provisions of the Ethics in Government Act apply to State officers and employees who receive annual compensation in excess of $55,298 or hold policymaking positions [Public Officers Law, Section 73-a.1.(c)]. The Act requires that all those with appointing authority in the State to designate which appointees are "policymakers". Because of the nature of their positions and responsibilities, policymakers must submit annual financial disclosure forms, regardless of the salary that they receive from the State.

The Ethics Commission issued guidelines that stated that a policymaking position is one which:

(a) has been determined to be managerial pursuant to subdivision 7 of Section 201 of the Civil Service Law because he or she formulates policy; or

(b) is in the non-competitive class under Section 2.2 of the classified service of the State of New York and, in Appendix 2 of the rules and regulations of the Department of Civil Service, is designated by the symbol ϕ on the basis that it requires the performance of functions influencing policy; or

(c) exercises responsibilities of a broad scope in the formulation of plans for the implementation of goals or policy for a state agency or acts as an advisor to an individual in such a position.

A State agency includes "any state department, or division, board, commission or bureau of any state department, any

public benefit corporation, public authority or commission at least one of whose members is appointed by the governor, or the state university of New York or the city university of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the state." [Public Officers Law, Section 73-a.1.(b)].

Because of the nature of your duties, it has been determined that you are a policymaker under the provisions of the Ethics in Government Act. This status means that you will be required to file a financial disclosure form, which the Ethics Commission will distribute in the beginning of April and which will be due on or before May 15. For your information, the content of the form is set forth in Section 73-a of the Public Officers Law. Additionally, the Ethics Commission has proposed regulations which would require policymakers to receive approval for outside activities. Copies of the regulations have been distributed to Division and Regional Directors.

If you have any questions concerning the completion of the disclosure forms, you should contact the State Ethics Commission, 11 North Pearl Street, Suite 1201, 4th Floor, Albany, New York 12207 or call them at 518-432-8207.

I thank you for the service that you render to the Department of Environmental Conservation and for the attention you will give to the disclosure procedure to ensure integrity in government.

Sincerely,

/s/

Thomas C. Jorling

Ms. Deborah I. Volberg
179 River Street
Troy, NY 12180

February 15, 1994

Dear Ms. Volberg:

As you may know, the financial disclosure provisions of the Ethics in Government Act apply to State officers and employees who receive annual compensation in excess of $57,509 or hold policymaking positions [Public Officers Law, Section 73-a.1.(c)]. The Act requires that all those with appointing authority in the State to designate which appointees are "policymakers". Because of the nature of their positions and responsibilities, policymakers must submit annual financial disclosure forms, regardless of the salary that they receive from the State.

The Ethics Commission issued guidelines that stated that a policymaking position is one which:

(a) has been determined to be managerial pursuant to subdivision 7 of Section 201 of the Civil Service Law because he or she formulates policy; or

(b) is in the non-competitive class under Section 2.2 of the classified service of the State of New York and, in Appendix 2 of the rules and regulations of the Department of Civil Service, is designated by the symbol ϕ on the basis that it requires the performance of functions influencing policy; or

(c) exercises responsibilities of a broad scope in the formulation of plans for the implementation of goals or policy for a state agency or acts as an advisor to an individual in such a position.

A State agency includes "any state department, or division, board, commission or bureau of any state department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the governor, or the state university of New York or the city university of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the state." [Public Officers Law, Section 73-a.1.(b)].

Because of the nature of your duties, it has been determined that you are a policymaker under the provisions of the Ethics in Government Act. This status means that you will be required to file a financial disclosure form, which the Ethics Commission will distribute in the beginning of April and which will be due on or before May 15. For your information, the content of the form is set forth in Section 73-a of the Public Officers Law. Additionally, the Ethics Commission has proposed regulations which would require policymakers to receive approval for outside activities. Copies of the regulations have been distributed to Division and Regional Directors.

In addition, O&D Memorandum 92-28 presently requires that Department employees carefully review their own outside activities for a potential conflict of interest and bring any outside activity which *may* present a conflict to the attention of their supervisor. In particular, it is important to closely scrutinize membership on governing boards of organizations which do business with the Department, lobby the Department, or are regulated by the Department, as well as political activities or office holding. Any questions should be

referred through the supervisory chain to the Office of General Counsel.

If you have any questions concerning the completion of the disclosure forms, you should contact the State Ethics Commission, 39 Columbia Street, 4th Floor, Albany, New York 12207. Telephone number is 518-432-8207.

I thank you for the service that you render to the Department of Environmental Conservation and for the attention you will give to the disclosure procedure to ensure integrity in government.

Sincerely,

Thomas C. Jorling/signature

Thomas C. Jorling
Ms. Deborah I. Volberg
353 Mountain Street
Albany, NY 12209

EXHIBIT C

New York State Department of
Environmental Conservation
50 Wolf Road, Albany, New York 12233

LOGO

Langdon Marsh
Commissioner

February 13, 1995

James Aube, Director
Division of Corporate and State Records
Department of State
162 Washington Avenue
Albany, NY 12231

Dear Mr. Aube:

Enclosed is an updated Deputization and Designation from the Department of Environmental Conservation. The document appoints Deborah I. Volberg to act as General Counsel of the Department of Environmental Conservation.

Please record this Deputization and Designation in the appropriate records of the Department of State. The Deputization and Designation expressly includes the designation specified by Executive Law Section 102(2). Specimen signature, as required by Section 102.2, is enclosed.

Sincerely,
Louis M. Concra, Jr./signature
Louis M. Concra, Jr., Director
Division of Regulatory Affairs

Enclosure

cc: L. Marsh
G. Spielmann
C. Barrella
D. Volberg

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

IN THE MATTER OF the Delegation and Designation of

DEBORAH I. VOLBERG

Acting as General Counsel of the New York State Department of Environmental Conservation

DELEGATION AND DESIGNATION

Sufficient reason appearing to the Commissioner therefor, DEBORAH I. VOLBERG is hereby designated to serve as chief legal officer to the Department and is responsible for the following activities:

(1) Provide direction to the Divisions of Legal Affairs Environmental Enforcement, Law Enforcement, Major Case Litigation Unit and regional Enforcement Unit;

(2) Oversee the Department's compliance and enforcement efforts, including formulation of departmental enforcement policies:

(3) Ensure coordination of the Department's activities with the activities of federal, state and local agencies;

(4) Review Administrative Law Judge's reports and assist the Commissioner in the decision-making process, and provide independent legal counsel to the Commissioner;

(5) Interpret the Environmental Conservation Law and departmental regulations and issue declaratory rulings where appropriate;

(6) Provide advice and legal opinion concerning all programs administered by the Department, and counsel the Department on its compliance with applicable laws and regulations;

(7) Chair the Office's Executive Policy Group which formulates and implements the goals, policies and objectives of the Office; prepares the Office's annual budget requests and maintains a control system over expenditures; and provides general management of Office affairs;

(8) Represent the Department to the Governor's Counsel, Attorney General, District Attorneys, Federal Environmental Protection Agency and U.S. Attorneys, judiciary and other legal offices as may be necessary, and coordinate with such offices as necessary, with respect to enforcement.

(9) Approve and submit to the Attorney General and Comptroller for examination and certification for payment, claims for injuries to personal or real property or personal injuries caused by an officer or employee of the State, which do not exceed $5,000 and are in excess of $250, pursuant to State Finance Law Section 8 (12-a);

(10) Authorize settlement of tort claims against the State involving this Department, pursuant to Section 20-a of the Court of Claims Act;

(11) Certify, pursuant to Public Officers Law Section 17(2), that an employee of the Department who is named as a defendant in a civil action or proceeding arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his or her official employment or duties is entitled to be represented by the Attorney General or assigned counsel;

(14) Certify payment by the State, pursuant to Public Officers Law Section 17(3) any settlement or judgment in an action against a Department employee, based on or arising out of an act or omission of the employee which occurred while the employee was acting within the scope of his other public employment or duties;

(15) Act as Appeals Officer for the Department with respect to the Freedom of Information Law; and

(16) Provide guidance and make decisions with respect to ethics and conflict of interest matters as they may affect employees and the public in accordance with the Public Officers Law and other applicable state and federal law.

Dated: Albany, New York
February 15, 1995

Langdon Marsh/signature
Langdon Marsh
Commissioner

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
APPOINTMENT OF ACTING GENERAL COUNSEL
DESIGNATION OF SUCCESSION
ORDER

Pursuant to Section 9 of the Public Officers Law, and section 102 (2) of the Executive Law

Deputization and Designation

The need exists for appointment and designation of an officer of the Department of Environmental Conservation authorized to act for the General Counsel in carrying out the General Counsel's duties and responsibilities under the Environmental Conservation Law and other applicable statutes and regulations, or in accordance with the internal management of the Department; and

The Public Officers Law, Section 9, authorizing the appointment, deputization and designation of such office, and such authority also being vested in the Commissioner pursuant to Section 3-0107 of the Environmental Conservation Law; and

The appointment, deputization and designations being internal management rules under Section 102(2) of the State Administrative Procedure Act;

NOW, THEREFORE,

DEBORAH I. VOLBERG, Acting General Counsel, is designated and deputized to act as Acting Deputy Commissioner and General Counsel and to sign any

documents which the Commissioner of Environmental Conservation is or would be authorized to sign, now or hereafter with the same force and effect as if signed by the Commissioner.

This order shall include the authority to sign the certificate required by Executive Law Section 102(2) which accompanies codes, rules and regulations, or the repeal thereof, which are submitted for filing with the Secretary of State.

A specimen signature of Deborah I. Volberg is affixed below.

Specimen signature

Deborah I. Volberg/signature
DEBORAH I. VOLBERG
Acting General Counsel

The order of appointment of deputies and designation of succession heretofore issued on April 4, 1994 is hereby amended by this order.

IT IS SO ORDERED.

J. Langdon Marsh/signature
J. LANGDON MARSH
Commissioner

Dated: February 15, 1995
Albany, NY

APPENDIX F

United States District Court

NORTHERN DISTRICT OF NEW YORK

DEBORAH I. VOLBERG,

Plaintiff,

-against-

GEORGE E. PATAKI, *et al.*,

Defendant.

95 Civ. 1095 (TJM)(DH)

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

STATE OF NEW YORK}

}SS.:

COUNTY OF WESTCHESTER}

CRAIG T. DICKINSON, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this Court. My bar roll number is 507959. I am an associate with Lovett & Gould, Esqs., attorneys for Plaintiff herein. I submit this affidavit in opposition to Defendants' motion or judgment on the pleadings and for summary judgment.

2. Plaintiff withdraws her Third Claim which is based upon her First Amendment right to freedom of association. Plaintiff withdraws only the claim based upon political affiliation; her claims based

upon Title VII, the First Amendment right to free speech, the First Amendment right to petition the government, and corresponding New York State rights remain in effect.

3. Due to the withdrawal of Plaintiff's political affiliation claim, Defendants' motion for summary judgment of this claim is moot. Accordingly, Plaintiff submits no statement pursuant to Local Rule 7.1(f).

4. Annexed hereto as Exhibit 1 is a copy of Plaintiff's First Amended Complaint.

5. For the reasons set forth in the accompanying memorandum of law, Defendants' motion should be denied in all respects.

WHEREFORE it is respectfully submitted that Defendants' motions for summary judgment should be denied in all respects.

Craig T. Dickinson/signature
CRAIG T. DICKINSON

Sworn to before me this
12th day of January, 1996.
Ann B. Frank/signature
Notary Public

/stamp/Ann B. Frank
Notary Public, State of New York
No. 01FR5022348
Qualified in Westchester County
Commission Expires January 10, 1998

APPENDIX G

United States District Court

NORTHERN DISTRICT OF NEW YORK

DEBORAH I. VOLBERG,

Plaintiff,

-against-

GEORGE E. PATAKI, *et. al.*,

Defendants.

95 Civ. 1095 (TJM)

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Deborah I. Volberg hereby appeals to the United States Court of Appeals for the Second Circuit from the March 1, 1996, judgment granting Defendants' motion to dismiss on the pleadings. Plaintiff appeals from each and every part of this Court's judgment dismissing the action.

Jonathan Lovett/signature
Jonathan Lovett (4854)
A MEMBER OF THE FIRM
LOVETT & GOULD, ESQS.
Attorneys for Plaintiff-Appellant
11 Martine Avenue
White Plains, N.Y. 10606
914-428-8401
Bar Code #: 507764

Dated: March 9, 1996

Supreme Court, U.S.
FILED
FEB 12 1997
CLERK

No. 96-1131

IN THE

Supreme Court of the United States

October Term, 1996

DEBORAH I. VOLBERG,

Petitioner,

against

GEORGE E. PATAKI, Individually and as Governor of State of New York, CONSTANCE KELLOGG-BARELLA, Individually and as Deputy Commissioner of the NYS Dept. of Environmental Conservation, FRANK BIFERA, Individually and Acting as General Counsel to the Dept. of Environmental Conservation, MICHAEL FINNEGAN, Individually and in his capacity as counsel to the Governor, and GAVIN DONOHUE, Individually and in his capacity as Special Assistant,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Respondents
The Capitol
Albany, NY 12224
(518) 474-6697

BARBARA G. BILLET
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General
and Counsel of Record

Of Counsel

THE REPORTER COMPANY AND THE WALTON REPORTER, INC.
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Questions Presented

1. Whether certiorari is warranted to clarify the First Amendment rights of terminated senior policy-makers, based upon an alleged conflict in the Courts of Appeals, where any differences in case outcomes simply reflect the particular place occupied by the individual employee-plaintiffs on the spectrum of policy-making authority, as well as the peculiar facts of each case.

2. Whether certiorari is warranted where the dismissal of the complaint was independently grounded on substantive Title VII precedent and qualified immunity.

Parties

The names of all parties appear in the caption of the case.

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No. 96-1131

In the

Supreme Court of the United States

October Term, 1996

DEBORAH I. VOLBERG,

Petitioner,

-against-

GEORGE E. PATAKI, Individually and as Governor of State of New York, CONSTANCE KELLOGG-BARELLA, Individually and as Deputy Commissioner of the NYS Dept. of Environmental Conservation, FRANK BIFERA, Individually and Acting as General Counsel to the Dept. of Environmental Conservation, MICHAEL FINNEGAN, Individually and in his capacity as counsel to the Governor, and GAVIN DONOHUE, Individually and in his capacity as Special Assistant,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION [1]

Statutes Involved

42 U.S.C. § 2000e, subdivision (f)

The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. * * *

New York Civil Service Law § 80(1)

Where, because of economy, consolidation, or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished * * * [,] suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs * * *.

---

[1] References to "App" refer to the Appendices to the Petition for Writ of Certiorari.

Counter-Statement of the Case

Petitioner's case is based upon a legal analysis memorandum to senior management at the New York State Department of Environmental Conservation ("the Department") which she wrote while employed as the Department's Acting General Counsel. She had been asked to, and did, identify seven of the Department's civil-service attorney positions to be eliminated as part of down-sizing of government. Petitioner's memorandum (*see* App, A-33--A-35) asserted that this retrenchment would result in State liability under Title VII of the Civil Rights Act [42 USC §§ 2000e *et seq.*] because of what petitioner assumed would be a disparate impact on recently hired minorities, who had little seniority. Shortly after petitioner sent the memorandum to respondents, she was terminated.

During her tenure at the agency, petitioner occupied senior policy-making positions, culminating in the position of Acting General Counsel. This was the position petitioner held when she wrote the memorandum in question (*see* App, A-44--A-45, ¶¶ 2-6; A-51--A-53; A-67; A-69--A-71). Her duties included: supervising bureau chiefs; counseling clients; managing caseloads; setting priorities for staff attorneys; ensuring coordination of activities among bureaus and all other units of the Department; requesting and allocating the Legal Affairs Division's fiscal and personnel resources; providing legal advice to the Commissioner; ensuring that program staff and managers had ready access to timely and reliable legal advice; approving case settlements and other resolutions; fostering a professional relationship with staff attorneys; encouraging professional growth for staff; maintaining good working relationships with other state agencies; and acting as the effective spokesperson for the Department's legal office. In short, by the time she was acting as General Counsel, she was the highest ranking attorney

in the entire agency. She was entrusted with expansive "policy-making" powers (App, A-51--A-53; A-56; A-58; A-65; A-67--A-69).

New York State employees are generally divided into four classes: "exempt", "non-competitive", "labor", and "competitive" (App, A-44, ¶ 3). Petitioner's position, which required the trust and confidence of the Department Commissioner, was classified as "exempt" (App, A-44, ¶ 3). "Exempt" employees do not obtain tenure, may be terminated without cause, and are not entitled to hearings prior to termination (App, A-44, ¶ 3). Petitioner never objected to her classification as an "exempt" employee (App, A-44, ¶ 3).

The amended complaint included allegations of "political termination" (*see* A-32 -- A-33, ¶¶ 10-13; A-35 -- A-36, ¶¶ 15-16), which petitioner later withdrew (*see* Petition, p 9). In the remaining claims which were not withdrawn, petitioner asserted that she had been terminated in response to her speech which opposed the firing of minority employees (A-35, ¶¶ 15-17).

The amended complaint was dismissed on two, independently dispositive grounds: first, for failure to state a claim upon which relief could be granted; and, second, on grounds of qualified immunity. *Volberg v Pataki*, 917 F Supp 909 (NDNY 1996) (App, A-8--A-27), *affd in unpublished memorandum*, ___ F3d ___ (2d Cir 1996) (text available on WESTLAW at 1996 WL 601405) (App, A-1--A-6). Both courts held that petitioner had not established a prima facie case of retaliatory discharge, since she could not have had an objectively reasonable belief that the planned retrenchment at the Department would violate Title VII (App, A-4, ¶ 1; A-13--A-15). Both courts recognized that an employer is not liable for any discriminatory effects of layoffs which might result from a bona fide seniority plan (App, A-4,

¶ 1; A-17--A-18). Both courts also agreed that petitioner's memorandum, in the context of legal advice to senior management, did *not* deal with matters of "public concern" as that term of art is used in the First Amendment context (App, A-4--A-5; A-19--A-23). Hence, her speech was not protected. Finally, as an independently dispositive ground for dismissal of the amended complaint, both courts agreed that respondents were entitled to qualified immunity (App, A-5--A-6; A-23--A-27). As prior precedent supported the termination of policy makers in comparable circumstances, respondents did not violate any "clearly established" constitutional right of petitioner (App, A-5--A-6; A-23--A-27).

ARGUMENT

POINT I

The alleged conflict in decisional law is non-existent.

Petitioner relies (Petition, pp 12-13) on cases from Circuit Courts of Appeal for an alleged conflict with the decision below. Those cases are factually distinguishable. There is no "conflict".

Petitioner claims (Pet., p 12) that the Second Circuit's unpublished decision conflicts with *Stough v Gallagher*, 967 F2d 1523 (11th Cir 1992), *reh. denied*, 978 F2d 718. The plaintiff in *Stough* was a deputy sheriff with very limited policy-making authority. *See* 967 F2d at 1529. Gallagher was the incoming Republican Sheriff and Stough had campaigned for Gallagher's Democratic opponent. Stough had occupied the civil-service position of Captain prior to the election. Upon election, Gallagher demoted plaintiff two ranks, from Captain to Sergeant. Sheriff Gallagher also re-published a *Career Civil Service Policy and Procedure Manual*, the relevant portion of

which confirmed pre-existing policy that officers at the rank of Captain or below were *not* policy-makers subject to removal by newly elected Sheriffs, except "for cause". *Stough*, 967 F2d at 1524-25. Thus, the defendant himself had promulgated a policy manual which assured deputies like plaintiff that employees at or below the rank of Captain were not subject to termination on account of political affiliation. *Stough*, 967 F2d at 1529.

There is no similarity at all between *Stough* and the case at bar. Petitioner was the chief legal counsel and a Deputy Commissioner at the Department. She had no civil service protection at all and thus had no expectations of continued employment. Unlike the plaintiff in *Stough*, petitioner was a high-level "policy-maker". *See* pp 2-3, supra. Thus, petitioner's first case in support of the alleged "conflict" is easily distinguishable.

Petitioner also relies (Pet, p 12) on *Patrick v Miller*, 953 F2d 1240 (10th Cir 1992). The plaintiff in *Patrick*, the former city finance director, had complained that one of the city managers had discriminated against black female employees by limiting them to "out of pocket" reimbursements for official travel, while white employees were reimbursed under the higher, mileage-based formula. Plaintiff had also criticized defendants for balancing a municipal budget by raiding a pension fund. *See Patrick*, 953 F2d at 1244, 1246-47. The Tenth Circuit said that "Patrick's statements concerning potential illegalities in the City budget process most certainly addressed a matter of political and social concern to the community". *Patrick*, 953 F2d at 1248. Plaintiff in that case had a fiduciary duty to other retirement board members to identify potentially illegal uses of retirement fund monies. 953 F2d at 1247.

Patrick is distinguishable from the case at bar. In addition to his speech critical of an unexplained and unjustified difference in reimbursing employee expenses (based on race), plaintiff in *Patrick* acted as a "whistle-blower" in objecting to the perceived illegal raid on the employee pension fund. In the case at bar, by contrast, petitioner was rendering legal advice to top government officials. The context was a memorandum related to down-sizing of government. An internal memorandum of legal advice is not remotely comparable to the facts of the cases upon which petitioner relies.

Finally, petitioner relies (Pet, p 13) on several Seventh Circuit cases. *See*, *Marshall v Porter County Plan Commission*, 32 F2d 1215 (1994), *cert. denied sub nom. Porter County Plan Commission v Marshall*, 115 S. Ct. 1111, 130 L.Ed.2d 1076 (1995); *Warzon v Drew*, 60 F3d 1234 (1995); and *Wilbur v Mahan*, 3 F3d 214 (1993). Those cases are also distinguishable.

Marshall was a "whistle blower" claim in which the former executive secretary of the county planning commission publicly criticized excessive mileage reimbursements received by the county building inspector, that officer's failure to perform building inspections, his pursuit of political activities on county time, as well as his failure to comply with the county's "open door" law. That "speech" is not remotely comparable to the legal analysis memorandum in the case at bar.

The other two Seventh Circuit cases cited by petitioner (*Warzon*; *Wilbur*) upheld summary judgment dismissals of the complaints. The plaintiff in *Warzon* was discharged following her criticism of superiors regarding the administration of the county health care plan. The Seventh Circuit affirmed the summary judgment dismissal of the complaint because plaintiff was a "policy-maker". The same result obtained in *Wilbur*,

where a deputy sheriff who had announced an intention to run for office against the incumbent was forced to take an involuntary leave of absence. The Seventh Circuit held that the employer could take into account the political affiliation of "policy-making" deputies.

Thus, the Seventh Circuit cases offer no support at all for the claim of an alleged conflict. The purported "conflict" among the Courts of Appeal is simply non-existent.

POINT II

The petition does not otherwise present legal questions warranting this court's review.

A. *Petitioner could not have had an objectively reasonable belief that disparate impact, resulting from the seniority effect of layoffs, would violate Title VII.*

The courts below correctly held (App, A-4, ¶ 1; A-13--A-15) that petitioner's Title VII claim failed to demonstrate facts which would support a "good faith, reasonable belief that the underlying challenged actions of the employer violated [Title VII]." *Manoharan v Columbia University College of Physicians and Surgeons*, 842 F2d 590, 593 (2d Cir 1988). A prima facie claim of retaliation under Title VII requires, among other things, that a person claiming to have been fired for protesting violations of other employees' rights under Title VII must have had an objectively reasonable belief that the challenged actions violated Title VII. *See Reed v A.W. Lawrence & Co., Inc.*, 95 F3d 1170, 1177-78 (2d Cir 1996). Petitioner failed to meet that threshold requirement since, in light of the seniority-based limitations on Title VII liability for disparate impact from layoffs, it was not objectively reasonable for the Department's Acting General

Counsel (petitioner) to believe that layoffs would result in liability.

Petitioner simply ignores the point that the "disparate impact", if any, upon minority employees at the Department resulted from a bona fide seniority system. Therefore, petitioner would have to allege, and ultimately prove, that New York Civil Service Law § 80—the statutory codification of the seniority rules—had been adopted with the *intent* to discriminate. *See, e.g., Trans World Airlines, Inc. v Hardison*, 432 US 63, 82 (1977). Petitioner has made no such allegation and has tendered no such proof.

It is a fact of life that those with less seniority are more vulnerable to down-sizing or retrenchment. For more than a century, New York's civil service seniority system has provided that layoffs will be based on seniority. *See, e.g., Turner v Berle*, 61 AD2d 712, 713-714, 404 NYS2d 50, 51-52 (3d Dept 1978) (the Department, in 1977-1978, was required to abolish 87 civil service positions to implement a 5% budget reduction); *Coleman v D'Ambrose*, 87 Misc 2d 341, 342-344, 384 NYS2d 942, 943 (Sup Ct New York Co 1976) (in times of retrenchment due to fiscal austerity, terminations are based on seniority); *see also, Lethbridge v Mayor*, 133 NY 232, 235-237, 30 NE 975, 976-977 (1892) (all civil service appointments are subject to the condition that the hiring agency receive sufficient budgetary allotments to fund the item; reductions in force are the normal and necessary consequence of shortfalls in appropriations for personnel expenses); *Crow v Ambach*, 96 AD2d 642, 465 NYS2d 71 (3d Dept 1983) (when an agency faces budgetary restrictions, it may abolish civil service items to accommodate those constraints).

Disparate impacts from the application of a neutral "last-hired, first-fired" seniority system do *not* violate Title VII. *Lorance v AT&T Technologies*, 490 US 900, 908-909 (1989); *Chance v Board of Examiners*, 534 F2d 993, 997-998 (2d Cir 1976), *cert. denied*, 431 US 965 (1977); *see also*, *Banas v American Airlines*, 969 F2d 477, 481, n.5 (7th Cir 1992) ("disparate impact cannot be used to invalidate a seniority system; intentional discrimination must be shown"). The existence of such a neutral seniority system is not an affirmative defense to be proven by an employer, but, instead, is a substantive limitation on Title VII liability. *Lorance v AT&T Technologies*, 490 US at 908-909; *see also*, Schlei & Grossman, *Employment Discrimination Law* (2d ed. 1983), pp 59-61; *id.*, 1987-1989 Supplement (published in 1991), p 12.

Since petitioner failed to allege a prima facie claim of retaliation, her Title VII claim was properly dismissed. That dismissal presents no question warranting this Court's review.

B. *The amended complaint was properly dismissed on the basis of qualified immunity.*

In any event, the amended complaint was properly dismissed for the independently sufficient ground of qualified immunity. Based on prior precedent, executives in respondents' position were entitled to assume that policy-making deputies, like petitioner, had only diminished expectations of First Amendment rights. In *Connick v Myers*, 461 US 138 (1983), this Court indicated that there is a substantial governmental interest in the effective and efficient operation of governmental agencies. In *Connick*, an elected District Attorney ("DA") terminated an assistant who had objected to how the DA ran the office. The employee had circulated a questionnaire critical of the DA, involving issues such as case assignments, as well as fund-

raising. This Court assumed that the "speech" regarding whether or not the DA had ever pressured employees to work on political campaigns met the threshold for speech relating to matters of "public concern". 461 US at 143-149. Nevertheless, this Court held that the termination of the employee did not affront the First Amendment. Because plaintiff's speech tended to undermine the DA's authority and to destroy the close working relationships in the office, the governmental interest in efficient operations outweighed any First Amendment interest of the employee.

In the case at bar, petitioner was not merely *an* attorney in a large law office; rather, she was the general counsel, meaning the chief legal advisor for the head of the agency. Surely, if ever there are any positions for which attorneys have substantially diminished First Amendment rights, petitioner's job was such a position. The Second Circuit has long held that government attorneys have very limited First Amendment protection, at least when the "speech" relates to the formulation of legal policy appropriately determined by the head of the agency. *See*, *e.g.*, *Giacalone v Abrams*, 850 F2d 79, 86-88 (1988) (assistant attorney general terminated for dissenting from top management's decision on how to resolve unsettled tax-law questions); *Lefcourt v Legal Aid Society*, 445 F2d 1150, 1153 (1971) (legal aid lawyer fired for dissenting from office's "plea bargaining" policy). In *Giacalone* and *Lefcourt*, the Second Circuit assumed that some of the staff attorneys' speech passed the threshold test for speech relating to matters of "public concern". Nonetheless, the court found that the governmental interest in having management set legal policy on open questions substantially outweighed any First Amendment interests of staff attorneys. Petitioner's case here is much weaker than those found wanting in *Giacalone* and *Lefcourt* because petitioner was General Counsel, rather than merely a staff attorney. Top management is

surely entitled to the highest degree of confidence and trust in its General Counsel.

In view of this Second Circuit authority, respondents did not violate any "clearly established" rights of petitioner. Therefore, the amended complaint was properly dismissed on the basis of qualified immunity, and this Court's further review is not necessary.

C. *Petitioner cannot assert First Amendment claims deriving from Title VII because, as an officer's "personal staff", she was not a covered employee under Title VII.*

Although respondents did not advance this argument below, there is a further, dispositive ground why the amended complaint fails to state a claim upon which relief can be granted. *See*, Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993), § 6.37, pp 373-374 (suggesting the appropriateness of raising alternative grounds to show the correctness of decision below or to indicate why the writ should be denied). Petitioner's First Amendment claims derive from her assertion that she was the victim of retaliatory termination because of her protest about alleged discrimination against other employees. However, petitioner has no standing to assert a Title VII retaliation claim. She does not meet the statutory definition of "employee" in section 2000e of Title 42 of the United States Code. Petitioner is specifically *excluded* from coverage under Title VII by virtue of the "personal staff" exception set forth in section 2000e, subdivision (f), which provides as follows:

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not

> include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, *or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office*. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. * * * (Emphasis added.)

As set forth above (*supra*, pp 2-3), petitioner is unquestionably a "policy-making" advisor to a Cabinet level officer. She was exempt from the state civil service protections. Therefore, the limitation clause on the "personal staff" exemption in § 2000e(f) for employees with civil service protection is inapplicable. In short, petitioner was not a covered employee under Title VII. *Cf. Gregory v Ashcroft*, 501 US 452, 467 (1991) (state judges, appointed by the Governor, were not protected by the Age Discrimination in Employment Act because they hold "policy-making" positions).

In *Gunaca v State of Texas*, 65 F3d 467 (5th Cir 1995), the court identified relevant factors to examine in determining whether an employee fell within the "personal staff" exemption with respect to elected officials or high-level appointees of elected officials: [1] whether the official has plenary powers of appointment and removal; [2] whether plaintiff is personally accountable to that official; [3] whether plaintiff represents that official in the eyes of the public; [4] whether the official exercises considerable control over the position occupied by plaintiff; [5] the level of plaintiff's position within the organization's chain of command; and [6] the intimacy of actual working

relationship between plaintiff and the officer. *Gunaca*, 65 F3d at 470 (construing ADEA exemption language identical to that in Title VII); *Teneyuca v Bexar County*, 767 F2d 148, 151 (5th Cir 1985) (same in Title VII case); *Americanos v Carter*, 74 F3d 138, 143-144 (7th Cir), *cert. denied*, 116 S. Ct.1853, 134 L.Ed.2d 953 (1996) (equating "personal staff" exemption in ADEA and Title VII with the "policy-maker" limitation on First Amendment liability recognized in political patronage cases). Petitioner's position as General Counsel obviously satisfies most or all of the *Gunaca* factors.

Although the lower courts have divided on whether particular plaintiffs were actually "policy-makers", once an employee has been determined to be a "policy-maker", he or she has no rights under Title VII and claims thereunder will be summarily dismissed. *See, e.g., Gunaca*, 65 F3d at 470-474 (investigator in district attorney's office was a "policy-maker"); *Americanos*, 74 F3d at 140-144 (same as to deputy attorney general); *Teneyuca*, 767 F2d at 150-153 (same as to assistant district attorney); *Dubisar-Dewberry v District Attorney's Office*, 927 F Supp 1479, 1483-86 (MD Ala 1996) (same as to child support coordinator); *Wall v Coleman*, 393 F Supp 826, 827-831 (SD Ga 1975) (same as to assistant district attorney); *but see, Montgomery v Brookshire*, 34 F3d 291 (5th Cir 1994) (because of factual dispute as to employee's status, court could not summarily dismiss complaint of deputy sheriff); *Johnson v Board of County Commissioners for County of Fremont*, 859 F Supp 438, 442-444 (D Colo 1994) (same as to sheriff's office dispatcher); *see also, Cromer v Brown*, 88 F3d 1315, 1322-1325 (4th Cir 1996) (examining job responsibilities of deputy sheriffs on a case-by-case basis).

Therefore, there are multiple, independently sufficient reasons why certiorari should not be granted.

Conclusion

This Court should deny the writ.

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Respectfully submitted,

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